

DECISIONS

OF THE DEPARTMENT OF THE INTERIOR
AND THE GENERAL LAND OFFICE

IN

CASES RELATING TO
THE PUBLIC LANDS

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OSCAR LAWLER,^a *Assistant Attorney-General.*

F. H. BARCLAY.	EDSON PHILLIPS.
E. F. BEST.	W. C. POLLOCK.
E. B. CARRIER.	G. C. ROSS.
F. W. CLEMENTS.	L. R. SMITH.
E. C. FINNEY.	J. H. THOMAS.
G. B. GARDNER.	J. F. TUFTS.
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J. W. HOWELL.	S. W. WILLIAMS.
O. W. LANGE.	P. E. WINTER.
A. W. PATTERSON.	C. E. WRIGHT.
E. O. PATTERSON.	

^a Appointed April 5, 1909, *vice* George W. Woodruff, resigned.

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

SIoux HALF-BREED SCRIP—DUPLICATE AND TRIPPLICATE ISSUE.

ADMINISTRATOR OF BERNARD LABATHE.

The Department has authority to issue duplicate Sioux half-breed scrip where the original is shown to have been lost or destroyed; and upon a clear and unequivocal showing of the loss or destruction of the original and duplicate, or as to the fraudulent procurement of the duplicate, triplicate scrip may issue.

First Assistant Secretary Pierce to the Commissioner of Indian Affairs, July 6, 1908. (F. W. C.) (C. J. G.)

An appeal has been filed from the action of your office denying the application of George A. Langovin, administrator of the estate of Bernard LaBathe, deceased, for issuance of triplicate Sioux half-breed scrip, No. 338, A, B, C, D, and E, aggregating 480 acres, the originals of which were issued in 1856 under the act of July 17, 1854 (10 Stat., 304). It is alleged that said scrip has been lost or destroyed.

It appears that duplicates of this scrip were issued in 1864 which, it is alleged, have also been lost or destroyed. It is further claimed that no one had authority to apply for such duplicates. The records of the General Land Office do not disclose that any of this scrip has been located.

It is held that the Department has authority to issue duplicates of this class of scrip. Seymour LaBathe (22 L. D., 40) and Charles D. Mouso (22 L. D., 42). This being true, no good reason appears why, upon proper showing, triplicates may not also be issued, but to justify such action the proof as to the loss or destruction of the originals and duplicates, or as to the fraudulent procurement of the duplicates, should be full and unequivocal.

APPLICATION FOR SURVEY—ACT OF AUGUST 18, 1894—"LAWFUL FILING."

STATE OF WASHINGTON.

The filing of an application for survey under the act of August 18, 1894, having such survey made, and paying the fees therefor, do not, in the absence of publication of notice of the application as provided by said act, constitute a "lawful filing" within the meaning of the excepting clause of the proclamation of June 12, 1905, reestablishing the boundaries of the Washington forest reserve.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 7, 1908.* (G. B. G.)

This is the application of the State of Washington for the selection of indemnity school land, per list No. 27, embracing 11,898.52 acres within the Seattle land district, Washington.

By your office decision of July 24, 1906, this list of selections was held for cancellation upon the ground, mainly, that the lands involved were not subject to the selection because of the fact that they are and were at the date of the President's proclamation creating the Washington forest reserve, June 12, 1905 (34 Stat., 3088, 3095-6), embraced within such proclamation. The State was duly notified of this decision but failed to appeal within the time prescribed by the rules of practice, but later, upon representations by the State invoking the supervisory power of the Secretary of the Interior, this Department, by letter of June 15, 1907, directed your office to forward the record in the case and that supersedeas issue to the local officers to take no further action respecting the tracts involved until the matter of the State's claim should be finally determined.

The lands involved are in township 33 north, range 8 east, Seattle land district, Washington, and the State applied for a survey of said township August 7, 1901, under the provisions of the acts of Congress of March 3, 1893 (27 Stat., 572, 592), and August 18, 1894 (28 Stat., 372, 394-5). A deposit for the survey of said township was made by the State; a contract for such survey was made April 22, 1902; the survey of said lands was executed in the field in August and September, 1902; the plat of survey was approved September 20, 1904, and was filed in the local land office at Seattle, Washington, March 20, 1906.

In allowing the State's application for survey the lands were withdrawn from settlement and entry by your office in accordance with the provisions of the act of 1894, but the State did not publish notice of its application in accordance with the provisions of that act, and did not therefore acquire any rights under the act by reason of such withdrawal.

So much is admitted, but it is also true that failure on the part of the State to publish notice of an application for the survey of lands within thirty days from date of such application, as provided by the act of August 18, 1894, *supra*, does not affect its preference right to select such lands for the period of sixty days from the filing of the township plat of survey, conferred by said act of March 3, 1893. *McFarland v. State of Idaho* (32 L. D., 107). The rights of the State, however, must be determined by the provisions in the act of March 3, 1893, *supra*, as follows:

The States of North Dakota, South Dakota, Montana, Idaho, and Washington shall have a preference right over any person or corporation to select land subject to entry by said State granted to said State by the act of Congress approved February 22, 1889, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States.

It will be noted that the State's right of selection under this act does not begin until the lands applied for have been surveyed and duly declared to be subject to entry under the general land laws of the United States. In the case of *Zeigler v. State of Idaho* (30 L. D., 1), it was held that no rights are secured under this act by virtue of a State selection tendered prior to the filing of the township plat of survey and it is not believed that any rights were secured in this case by the filing of the application for survey, having such survey made, and paying the fees therefor. The State might have protected itself in the premises by publishing the notice of its application for survey in accordance with the provisions of the act of 1894, but, heretofore shown, this was not done. It therefore took nothing by these preliminary acts and could have acquired no preference right under the act of 1893 until the filing of the township plat of survey, which, as has been seen, was March 20, 1906.

In the meantime, as above stated, on June 12, 1905, said lands were included within the boundaries of the Washington forest reserve by the President's proclamation of that date, which contains the following excepting clause:

All lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired.

It is contended by the State that its application for survey, its having the land surveyed and paying the fees therefor, constitute a lawful filing within this excepting clause. The Department can not admit this contention. Such acts as are here relied on can not, in any sense, be called a lawful filing and they are surely not such within the excepting clause above quoted. Inasmuch as the State had taken no

steps to protect its interests in the premises, it had no such rights as prevented the properly constituted officers of the United States from making other disposition of the lands not inconsistent with law. The President of the United States had the legal right to establish this forest reserve and there was no such claim upon the lands as comes within the excepting clause of the proclamation establishing said reserve, or which may be given recognition.

The decision of your office is affirmed.

SOLDIERS' ADDITIONAL—SECOND ENTRY—RIGHT EXHAUSTED.

FRANK L. MORGAN.

Where one entitled to a soldiers' additional right of eighty acres under section 2306 of the Revised Statutes, based upon an original entry canceled upon relinquishment, was permitted to make a second homestead entry for eighty acres, at a time when there was no law authorizing second homestead entries, and patent having issued upon such entry, it will be regarded as having been made in the exercise of, and as exhausting, the soldiers' additional right.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 7, 1908.* (C. J. G.)

An appeal has been filed by Frank L. Morgan, assignee of Isaac J. Taylor, from the decision of your office of April 13, 1908, rejecting his application to enter under section 2306 of the Revised Statutes the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 17, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20, T. 24 N., R. 12 W., Olympia, Washington.

The claimed right is based on the alleged military service of Taylor for more than ninety days, as a private in Co. "A," 3rd Regiment Colorado Cavalry, and homestead entry made by him February 15, 1866, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 26, T. 3 S., R. 7 E., Junction City, Kansas, canceled on relinquishment November 19, 1868.

November 29, 1886, Taylor made homestead entry for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 12, T. 21 S., R. 4 W., Roseburg, Oregon, upon which final certificate issued January 23, 1893, and patent June 15, 1893. Application for this entry was made under section 2289 of the Revised Statutes, and in his homestead affidavit and final proof Taylor stated that he had never before made a homestead entry. The proof showed that he established residence April 1, 1887, and that such residence was continuous to date of proof. His improvements consisted of a frame house, 22 by 32, barn, hen-house, fences, clearing, etc., of the value of \$1400. He also had 200 fruit trees and 18 acres in cultivation on

which he had raised crops for six seasons. Section 2306 of the Revised Statutes provides:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

At the date of Taylor's Roseburg entry there was no law authorizing the making of a second homestead entry, it being prior to the act of March 2, 1889 (25 Stat., 854). He was entitled, however, to make an additional entry under section 2306 of the Revised Statutes. He therefore had no right to make the Roseburg entry, except in the exercise of his additional right under said section. At that time it was the established rule that the relinquishment or abandonment of an original homestead entry for less than 160 acres did not disqualify a soldier from making an additional entry under section 2306 of the Revised Statutes. John W. Hays (May 8, 1876, 3 C. L. O., 21). But it was also held in that case "to perfect title to the additional entry he must comply with the law by actual residence thereon and cultivation thereof for the required period." This ruling was followed in the cases of Owen McGrann (5 L. D., 10) and Samuel Hilton (13 L. D., 694). It thus appears that Taylor complied with the law governing soldiers' additional entries as the law was at the time construed. This rule obtained until the instructions of June 3, 1897 (24 L. D., 502), wherein it was held:

There is no authority of law for the insertion of a condition in a soldiers' additional homestead certificate of right, requiring settlement and residence on the part of the soldier, where the original entry was abandoned.

See also cases of Ricard L. Powel (28 L. D., 216) and Sierra Lumber Co. (31 L. D., 349).

It is a maxim that the law will presume that to have been done which ought to have been done, and it will not be presumed that it was the intention of Taylor to consummate an illegal entry. Furthermore, it is a rule in the administration of the land department that an entry allowed under a law which does not authorize it may be permitted to stand under a law which does authorize it. Hence, Taylor's Roseburg entry, which could not be properly and legally allowed as an original or second homestead entry, may be treated as having been made as an additional entry under section 2306 of the Revised Statutes, which he was entitled to make. And, as held by your office, "having received patent on said Roseburg entry the same must be held to have been made under section 2306, R. S., and he thereby exhausted his additional right under said section and at the date of his assignment had no such right which he could assign."

This is the proper rule applicable to the circumstances of this case, and not that in the cases of John J. Stewart (9 L. D., 543) and Edgar A. Coffin (31 L. D., 430), relied upon in the appeal, the Roseburg entry of Taylor having been made prior to the act of March 2, 1889. The reasonable presumption will be adopted that it was the intention of Taylor to make an entry to which he was entitled rather than through misrepresentation of facts to obtain an unauthorized entry with the hope and expectation that it would be confirmed under an act not then in existence.

The decision of your office herein is affirmed.

ENTRIES WITHIN RESERVOIR SITES—RIGHT OF WAY—RECLAMATION ACT.

McMILLAN RESERVOIR SITE.

A permanent easement attaching to public lands by the construction of a reservoir and canals upon a right of way acquired under the act of March 3, 1891, does not, upon acquisition of such irrigation system by the United States for use in connection with a project under the reclamation act, become extinguished by merger in the estate of the government in such reservoir lands; and entries allowed for lands within and below the flowage contour line of the reservoir as marked upon the township plat, are subject to the right of flowage by storage of waters in the reservoir.

Where the government acquires an irrigation system held in private ownership, for use in connection with a reclamation project under the act of June 17, 1902, it takes the same free from any obligation or control of State authority theretofore existing.

First Assistant Attorney Clements to the Secretary of the Interior,
July 7, 1908. (J. R. W.)

There is referred to me for opinion the letter of the Acting Director of the Reclamation Service of June 20, 1908, as to rights of sundry persons by entries of lands within the McMillan reservoir site, part of the properties or irrigation system of the Pecos Irrigation Company, and conveyed to and acquired by the United States in connection with the Carlsbad project under act of June 17, 1902 (32 Stat., 388).

The facts, as stated by the letter, are that February 23, 1897, right of way was approved by the Secretary of the Interior under act of March 3, 1891 (26 Stat., 1095), to the Pecos Irrigation Company, including these lands, as site of a reservoir. The company entered on construction of its system, and, among other works, made a dam for impounding water which covered these lands during the winter of 1893-4, and at intervals for some years. For some reason, whether

faulty construction of the dam or porousness of the reservoir bed is not stated, leaks developed and the water level was not maintained to keep these lands covered, but they were within and below the flow-age contour line marked on the township plats, and the company during its holding continued investigation into causes of leakage with view to its prevention, which investigations were continued by the Reclamation Service since the purchase. The intention and purpose of the Pecos Company and of the Reclamation Service has at all times since construction of the reservoir been to utilize it to its full capacity for storage of water and to stop the leakage as soon as possible.

It is also stated that, among other entries of lands in the reservoir site, certain two desert-land and three homestead entries were made at dates stated, between May 7, 1903, and July 30, 1904, for lands described, on which final proofs have been offered and final certificates issued at dates stated, the two oldest of which were February 5 and 12, 1906, and the others since July 1, 1907. Prior thereto the Reclamation Service recommended the General Land Office that—

to avoid necessity for purchase of the entrymen's rights upon ultimate refilling of the reservoir to its former flow line, patent should not be issued to the entrymen for above described lands.

January 11, 1908, the Commissioner replied that under opinion of the Assistant Attorney-General, June 17, 1904, in case of the Hudson Reservoir Canal Co., Arizona (unreported), "purchase by the United States of rights of said company extinguished the easement and freed the land from the right of way so that any entry made for lands affected is now free from any such rights," but, as the lands were January 25, 1906, withdrawn from all disposition under act of June 17, 1902, in accordance with approved opinion of the Assistant Attorney-General of January 25, 1906 (34 L. D., 421), the entry would remain *in statu quo* until terms of settlement with the entryman are concluded and the General Land Office advised thereof.

The Director of the Reclamation Service deems the opinion referred to not precedent for the present case. He also asks review of the opinion of my predecessor of June 17, 1904, in case of Hudson Reservoir and Canal Company, and says:

Although it has been shown there is an essential difference between the cases it is believed the decision [opinion] in the Hudson reservoir case was not deducible from the circumstances, and that opinion should be reconsidered in order that it may not establish a precedent for similar cases. This view is supported by the decision [opinion] of the Assistant Attorney-General, January 6, 1906, on purchase of the irrigating system of the Maxwell Land & Irrigation Company, partially constructed, in connection with the Umatilla project. . . . It follows therefore from this that the attitude of the Government is that of an assignee and successor preparing to assume the company's obligations to the public. This was the attitude of the Government in the Hudson reservoir case. The Government in purchasing was assignee and successor of valid rights possessed by the company. The theory advanced in the decision that "finding the Hudson Reservoir and Canal Company and its assertion of vested rights in its way, an obstruction to its operations, the United

States paid a price agreed upon for its withdrawal from the proposed field of operation," is hardly in accord with the facts.

It is then argued at considerable length that as the Hudson Reservoir and Canal Company, vendor, and the United States, vendee, both intended to use the lands in the reservoir site for the same purpose, no merger or extinguishment of the vendor company's right could occur.

While there are two distinct questions in the reference, they are so connected that both may for brevity be considered together as different aspects of the general doctrine of merger of dominant and servient, or less and greater, estates, when both come to hands of the same owner.

In the present case there was a valid and vested right. The Pecos Company's system had been constructed to be a concrete integral whole, consisting of canals to convey water for irrigation purposes and a reservoir for storage and conservation of flood waters, so that water which would otherwise flow away could be stored and the average flow and service of the canal be, and was, greater than the ordinary flow of the diverted stream. The capacity of the canal was necessarily made greater than sufficient to carry the ordinary flow of the stream by such amount as was necessary to carry the stored flood water distributed over the irrigation period of the year. Obviously, such a property is an entirety; each part—the canal and the reservoir—dependent on the other in considerable degree; the two parts not capable of severance without seriously impairing the value of one or of both. The mere fact that the reservoir did not fully meet its purpose did not sever it from the canal property, or prevent its passing and continuing existence as part of the entirety—or system—unless the owner of the system had abandoned the purpose of making it an efficient part of the property.

On the other hand, the Hudson reservoir site had never been utilized, no water ever stored there, no works for storage ever undertaken, nor, so far as I am advised, was any canal ever made. So far as concerned the reservoir site, it was a mere project never entered upon. It had no vested right in the lands within the contour line of the proposed reservoir site. As to the nature of the right obtained by the Hudson Company, light is given by the decision in *Bybee v. Oregon and California Railroad Company* (139 U. S., 663, 679–80). There was a conflict of claims of right of way between Bybee, who constructed his ditch in May, 1879, claiming right of way under act of July 26, 1866, section 9 (14 Stat., 253), and the railway company under act of July 25, 1866 (14 Stat., 239), which did not construct its line until after 1880 and apparently not until after December 3, 1883. The court held that the railway grant of right of way being prior in time was prior in right. As to the canal right the court held that claimant—

acquired no right to any portion of the public lands until his actual taking possession of the same for the purpose of constructing a ditch, and in doing so he took the risk of encroaching upon the right of way which the railroad company might thereafter select.

Also discussing the question of conditions imposed upon a grant *in presenti*, the court says (ib. 679):

It is not, indeed, always easy to determine whether a condition be precedent or subsequent; it must depend wholly upon the intention of the parties as expressed in the instrument and the facts surrounding its execution.

The act of 1891, sections 18-21 (26 Stat., 1101-2), differs in terms from that of 1866 under which Bybee claimed in that by the earlier act right was merely "acknowledged and confirmed," implying the existence of a canal before arising of a grant, whereas the act of 1891 provides for approval of maps to be filed in advance of construction, and that—

if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent the same is not completed at the date of the forfeiture.

I deem it immaterial, as between others than the United States, whether the Hudson Company had or had not a right continuing after five years from approval of its map to begin and complete its reservoir. It had not completed or begun it. The property or reservoir site had not become part of an integral entire property valuable as a unit. Its right was not attached to the land as a permanent easement entitling the company to its use. The fee was in the United States. The conveyance of such a mere right to obtain an easement by its holder to the owner of the fee was nothing more than a relinquishment of the right and restoration to the unincumbered fee. There was no dominant estate to keep the easement from merger in the fee held by the United States.

It is otherwise in the Pecos system—a constructed concern. The property preserved its entirety, and no merger of a permanent easement in public lands actually acquired by the grantor would occur, for the easement was essential to value of the dominant estate—the canal—which was intended to be preserved and operated. For such reason the opinion in Hudson Reservoir and Canal, on different facts, is not applicable. I am of opinion that, taking the facts as stated, the entrymen hold rights subject to right of flowage by storage of waters in the reservoir, unless in fact the Pecos Company or the United States prior to withdrawal of the lands, January 25, 1906, under the first form, did such acts as amounted to abandonment of the reservoir part of the Pecos Company's project. As to that fact a question may be raised by the entry claimants, and no decision can be made until they have opportunity to be heard. Where final proof is

offered and final certificate is claimed in like cases in future, the case should not go to approval, final certificate, and patent until the facts are ascertained and the rights of the entryman and the United States are brought to issue and proofs taken.

On review of the opinion of my predecessor in case of the Hudson Reservoir and Canal Company, I find no error therein, on the facts stated, and for reasons herein given adhere thereto.

I call attention to what appears to me an erroneous view taken by the Reclamation Service of the effect of acquiring property of a local irrigation company. Speaking of the attitude assumed by the government of the United States in such case, the Reclamation Service says:

The attitude of the Government is that of an assignee and successor preparing to assume the company's obligations to the public. This was the attitude of the government in the Hudson Reservoir case.

The duties of an irrigating company are defined by the law of the State in which it operates as doing a business affected by a public use; and it is subject to the local law applicable to such public utilities and to control of the local courts for enforcement of such laws. There is no authority in the reclamation act for the Secretary of the Interior to subject the property and enterprises of the United States to local law or control by local authority, either judicial or executive. A reclamation project is an exercise of federal power whereby the United States, as correctly stated by my predecessor in his opinion, referred to, "of its own initiative under the act of June 17, 1902, proposes to construct a public work independent in origin of right and of obligation." Whatever obligation it assumes in acquisition of property is contractual, not such as local law implies by succession of one owner to another owner of public utilities organized by State authority and subject to its laws and courts. The local concern acquired is simply obliterated as respects local law as completely as is cement, stone, timber, or material built into the reclamation works. To hold otherwise would lead to conflict of State and federal authority and embarrass the United States in its work for reclamation of arid lands. Reclamation works of the United States, whether constructed or purchased, are agencies of the general government, independent of obligation or control by State authority, and though purchased by the general government from public utility owners subject to State law, after such purchase they are not held by the United States as legal successor of the owner, but as its own public works, subject only to such obligation and control as is authorized by Congress.

Approved and referred to the Reclamation Service for appropriate action.

FRANK PIERCE,
Acting Secretary.

PROPERTY OF THE
GENERAL LAND OFFICE

COLLECTION OF RECLAMATION WATER-RIGHT CHARGES BY
RECEIVERS OF PUBLIC MONEYS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 27, 1908.

1. Section 5 of the Reclamation Act (June 17, 1902, 32 Stat., 388) provides:

The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund.

2. In accordance with the foregoing all payments of the annual installments of reclamation water-right charges, including the portions for building charges and operation and maintenance charges on reclamation water-right applications, shall be made to the receivers of public moneys of the respective local land districts, *but*, for the convenience of the water-right applicants, the charges provided may be tendered to and received by the designated special fiscal agents for the several irrigation projects for transmission by them to the proper receivers of public moneys. Under the law quoted in paragraph 1 above, the acceptance of these water-right charges by the fiscal agents of the Reclamation Service can not be held to be a payment to the United States in accordance with the requirements of section 5 of the Reclamation Act until the moneys are actually in the hands of the proper receivers of public moneys. The permission granted above is only for the convenience of water-right applicants, but care will be taken to properly safeguard the handling of such funds until their receipt by the respective receivers of public moneys.

3. Receivers should not accept a payment for either a part of that portion of the annual installment due representing building charges, or payment of a part of that portion representing operation and maintenance charges. Receivers should accept only tenders which are for the full amount of either portion of the annual installment longest due and unpaid; but nothing herein contained shall operate to prevent the payment at one time of all installments due. Payment of a part of the amount due on either class of charges should be refused, except as provided in paragraph 6.

4. When full payment is tendered direct to the receiver of public moneys, and upon examination is found to be correct, the receiver will issue the usual receipt.

5. Where payment is tendered through special fiscal agents of the Reclamation Service, and, upon examination, the amounts so transmitted by the special fiscal agents are found to be correct, the receiver will then issue the usual receipt and transmit the same to the water-right applicant at his record post-office address. The receiver will receipt to such special fiscal agent upon one copy (and retain the other copy) of the "Abstract of Receipts of Reclamation Water-Right Charges (R. S. Form 7-406)" received from the special fiscal agent at the end of each month. See section 8 of instructions of even date to special fiscal agents by the United States Reclamation Service.

6. Receivers may accept tenders for less than the full portion of building charges or operation and maintenance charges of any annual installment as fixed by existing public notices when the tenders are received through the special fiscal agents, whose duplicate receipts show a recommendation for the issuance by the Secretary of the Interior of a public notice fixing the amount of the particular annual installment, or portion of installment, at the amount of cash transmitted. Receivers will then issue to the water-right applicant the usual receipt for the amount of cash so transmitted, and mail the same to his record post-office address, the receipt showing that payment has been made "to be applied upon the 190— installment in connection with Reclamation Water-Right Application No. ____". If the recommendation is approved by the Secretary of the Interior, registers will, upon receipt of notice of the same from this office, make proper notation upon their records.

7. Attention is invited to paragraph 4 of circular of instructions to special fiscal agents by the United States Reclamation Service, of even date, and in accordance therewith receivers of public moneys will require payment direct to themselves in all matters involving tenders for fees on homestead entries; tenders for first installments on water-right applications, including both the portion for building and the portion for operation and maintenance charges where the public notices require the first installment to be paid at the time of filing homestead entries; ^a tenders for installments in arrears for a period of more than one year; and tenders upon water-right applications where a notice of contest against the entry upon which the water-right

^a DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., July 8, 1908.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The provision in paragraph 7 of "Regulations as to the Collection of Reclamation Water-Right Charges by Receivers of Public Moneys," approved May 27, 1908, which requires payment in cash for first installment on water-right applications, where the public notice requires the first installment to be paid at the time of entry, is hereby amended so as not to apply to entries made

application rests, has been reported by the register of the land office. In all such cases, payments must be made direct to the receiver of public moneys.

8. All moneys collected under this circular in connection with water-right applications, both those received direct from water-right applicants and through special fiscal agents, must be deposited in receivers' designated depositories to the credit of the Treasurer of the United States "on account of *Reclamation Fund, Water-Right Charges.*"

FRED DENNETT, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,

Secretary.

COLLECTION OF RECLAMATION WATER RIGHT CHARGES BY SPECIAL
FISCAL AGENTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, D. C., May 27, 1908.

1. Section 5 of the Reclamation Act (32 Stat., 388) provides:

The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated and a failure to make any two payments when due shall render the entry subject to cancellation with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund.

2. In accordance with the foregoing all payments of the annual installments of reclamation water right charges, including the portions for building charges, and operation and maintenance charges on reclamation water right applications shall be made to the receiver

in the exercise of a preference right secured by contest; nor to entries where a relinquishment of a former entry has been secured and is filed by the applicant.

In these classes of cases you will pass upon the qualifications of the applicant to make homestead entry; and, if you find him so qualified, notify the proper project engineer of the Reclamation Service of that fact, and the case will thereafter be governed by and disposed of under the provisions of paragraph 6 of said regulations of May 27, 1908.

Should you find the applicant not qualified, you will reject his application when presented, with the usual right of appeal.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved, July 8, 1908.

FRANK PIERCE,

Acting Secretary.

ers of public moneys of the respective local land offices, *but*, for the convenience of the water right applicants the charges provided may be tendered to and received by the designated special fiscal agents for the several projects, for transmission by them to the proper receivers of public moneys. The usual receipts for such payments (G. L. O. Form 4-186) shall, in all cases, be issued by the receivers; but receipts on form 7-459 shall be issued by the fiscal agents for the moneys accepted by them for transmission to the receivers.

Under the law quoted in paragraph 1 above, the acceptance of these water right charges by the fiscal agents of the Reclamation Service cannot be held to be a payment to the United States until the moneys are actually in the hands of the proper receivers of public moneys. The permission granted above is only for the convenience of the water right applicants. But care will be taken to properly safeguard the handling of such funds until their receipt by the respective receivers.

3. Special fiscal agents should accept only tenders in lawful money, *i. e.*, coin or currency, *except* that they may accept tenders of commercial paper, as warrants, drafts, checks, postal express or bank money orders, when they can without recourse upon themselves convert such paper into lawful money before issuing their receipts.

4. Special fiscal agents should accept only tenders which are for the full amount of the current, or last previous annual installment, or for the portion for building charges, or the portion for operation and maintenance charges, under each water right application.

When water right applicants have surrendered cooperation certificates issued by the Water Users' Association, and these have been accepted by the project engineer and in consideration thereof he has recommended that certain installments or portions of installments be reduced, special fiscal agents should accept tenders of the amounts of the charges as thus readjusted, and should note on the duplicate copy of their receipts (see paragraph 6) "Fixing of charges at the above amounts recommended by project engineer."

Except as provided in the foregoing, special fiscal agents should refuse partial payments. They should also refuse tenders for fees on homestead entries; tenders of the first installments, where the public notices require the first installments to be paid at the time of filing homestead entries and water right applications [see amendment, 37 L. D., 16]; tenders for installments in arrears for a period of more than one year; and tenders upon water right applications where a notice of contest against the entry upon which the water right application rests has been reported by the register of the local land office. In all such cases the water right applicant should be directed to deal directly with the receiver of the local land office.

5. In addition to the amount of the annual installment, or the portion for building charges, or the portion for operation and main-

tenance charges, special fiscal agents should collect from each water right applicant an amount sufficient to pay for the fees on postal money orders to be used in transmitting the collections to the receiver of public moneys. The fees charged are as follows:

For orders from \$0.01 to	\$2.50	3 cents.
“ 2.51 “	5.00	5 “
“ 5.01 “	10.00	8 “
“ 10.01 “	20.00	10 “
“ 20.01 “	30.00	12 “
“ 30.01 “	40.00	15 “
“ 40.01 “	50.00	18 “
“ 50.01 “	60.00	20 “
“ 60.01 “	75.00	25 “
“ 75.01 “	100.00	30 “

Postal money orders are not issued for amounts over \$100. The amount to be collected for such fees on a tender of \$156 will, accordingly, be 50¢, of which 30¢ is for an order of \$100, and 20¢ for one of \$56.

6. Special fiscal agents should issue to each water right applicant tendering complete and satisfactory payment as above a receipt on Form 7-459, making a carbon duplicate on the following blank receipt bearing the same serial number, and retaining a complete record thereof on Form 7-406.

7. Special fiscal agents should each day transmit to the receiver of public moneys for the land office in which are situated the lands for which collections have been made, the duplicate copies of all receipts issued by them, with a remittance of the amounts collected. These remittances should be made by postal money orders, payable to the receiver for the exact amounts transmitted by each water right applicant, the fees on which should be paid from the amounts collected therefor from the water right applicants.

8. Special fiscal agents should, immediately following the end of each month prepare three (3) copies of an abstract of “Receipts of Reclamation Water Right Charges transmitted to the Receiver of Public Moneys for the Land Office at ———” on Form 7-406. This abstract should include a record of the number of the fiscal agent's receipt, payor, number of water right application and year of installment paid, for each collection made by him since the last previously reported, the funds for which have within the period covered by the abstract been remitted to the receiver of public moneys as herein provided. At the end of the abstract the following certificate should be made:

Project Office at ——— 190—.

I certify that the foregoing in ——— sheets, is a correct and complete abstract of the receipts issued by me, and records all collections not heretofore reported, made by me to the ——— day ———, 190—.

Special Fiscal Agent U. S. R. S.

Special fiscal agents should then send two (2) copies of the abstract as herein provided to the receiver of public moneys, who will acknowledge receipt thereof, and of the remittances previously received and reported thereon, on one copy of the abstract, and return it to the fiscal agent to be retained in the project office. The fiscal agent should then complete the third abstract—making it a complete copy of the one retained and transmit it to the Director at Washington, D. C.

9. Special fiscal agents should *not* carry into their accounts current (Form 7-400) and abstracts of collections (Form 7-405) entries of these transactions covering collections of reclamation water right charges.

F. H. NEWELL, *Director*.

Approved:

JAMES RUDOLPH GARFIELD,

Secretary of the Interior.

COLLECTION OF RECLAMATION WATER RIGHT CHARGES BY SPECIAL
FISCAL AGENTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES RECLAMATION SERVICE,
Washington, D. C., July 8, 1906.

TO PROJECT ENGINEERS AND SPECIAL FISCAL AGENTS.

SIRS: The provision in paragraph 4 of the "Regulations as to the Collection of Reclamation Water Right Charges by Special Fiscal Agents," approved May 27, 1908 [37 L. D., 14], which requires fiscal agents to refuse tenders of first installments where the public notices require the first installments to be paid at the time of filing homestead entries and water right applications, is hereby amended so as not to apply to payments upon applications made on homestead entries made in the exercise of a preference right secured by contest, nor those on entries where a relinquishment of a former entry has been secured and is filed by the applicant.

In these cases the project engineer may accept cooperation certificates if tendered; and fiscal agents may accept cash for the whole installment, or the portion not covered by certificates, and remit it to the receiver. When the qualifications of the applicant to make homestead entry have been passed upon by the register and receiver, they will report their action to the project engineer, and if favorable he should transmit the surrendered and cancelled certificate to the Di-

rector with his recommendation for reduction of charges for the issuance of a special public notice.

Very respectfully,

C. H. FITCH,
Acting Director.

Approved:

FRANK PIERCE,
Acting Secretary.

MINERAL LANDS—CLASSIFICATION—FRESNO AND KING COUNTIES,
CALIFORNIA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 10, 1908.

REGISTER AND RECEIVER,
Visalia and Oakland, California.

SIRS: By office letters of August 21, and November 8, 1907, certain described lands situated in Fresno and King counties were temporarily withdrawn from agricultural entry pending an investigation of the character thereof by the Geological Survey, and you were directed to note the withdrawals on your records and thereafter to accept no agricultural entries or filings therefor until further advised by this office.

I am now in receipt of a report dated June 17, 1908, from the Director of the Geological Survey, in which the lands described in the list hereto attached ^a are classified as oil lands. You will note this classification on your records.

Applications for these lands as mineral may be presented, received and adjudicated under the existing mining laws and regulations, but applications under the agricultural laws must be accompanied by *ex parte* affidavits alleging the non-mineral character of the tracts applied for and must be forwarded to this office for consideration, whereupon, if the showing made appears sufficient, a hearing will be ordered to determine the real character of the land, the burden of proof, in view of the classification, being upon the agricultural claimant.

The remainder of the lands withdrawn by said letters of August 21, and November 8, 1907, and not hereby classified, with the exception of those withdrawn in Tps. 25 S., Rs. 17, 18 and 19 E., and Tps. 26 S., Rs. 18, 19, 20 and 21 E., are restored to filing and entry

^a List omitted.

under the general land laws. The townships above described will be made the subject of a communication in the future.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

CITIZENSHIP—NATURALIZATION—JAPANESE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 11, 1908.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: It has come to the knowledge of this office that the clerks of certain State courts have permitted Japanese and other aliens, who are not eligible to citizenship, to file declarations of intention to become citizens of the United States.

Your attention is called to the fact that the naturalization laws permit only the naturalization of "white persons or aliens of African nativity and to persons of African descent," and you are therefore directed not to recognize any declaration of intention, or final naturalization, of persons of any race who are not entitled to naturalization, or to permit such persons to make either original or final entries of public lands.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

HAWAII—PUBLIC LAND LAWS—APPELLATE JURISDICTION OF THE
SECRETARY OF THE INTERIOR.

MICHAŁ PSZYK.

The public land laws of the United States have no application in the Territory of Hawaii, nor has the Secretary of the Interior any appellate jurisdiction to review the action of the territorial officers with respect to public lands in that Territory.

First Assistant Secretary Pierce to T. J. Ryan, Mountain View,
(F. W. C.) *Hawaii, July 20, 1908.* (C. E. W.)

The Department is in receipt of your appeal in behalf of Michal Pszyk, claimant under right of purchase lease entry No. 546, made October 31, 1906, for lot No. 104, map 23, 80 acres, Olaa reservation, in the Territory of Hawaii, said entry being held for cancellation by the Territorial public land officers on the ground that claimant was not a citizen nor had filed a valid declaration of intention to become a citizen at the time of entry.

It appears that claimant prior to attaining the age of twenty-one years, filed his previous declaration of citizenship. The Territorial court denied his application for final papers February 4, 1908. The following day, he again declared his intention to become a citizen of the United States. The Attorney-General of the Territory holds that he has lost such rights as he acquired by his entry of October 31, 1906, and that he must apply *de novo*, although he has already cultivated forty per cent of his land—considerable in excess of the statutory requirement (R. L., Hawaii, Sec. 319).

You are advised, however, that this Department has no jurisdiction to entertain said appeal. The existing laws of the United States relative to public lands do not apply to such lands in the Territory of Hawaii. (Jt. Res. of July 7, 1898, 30 Stat., 750.) On the contrary, the laws of Hawaii govern the issue. (Act of April 30, 1900, 31 Stat., 141.) By no statute is the Secretary of the Interior vested with any appellate jurisdiction. Your circuit courts apparently are authorized to act in case of dispute, disagreement, or misunderstanding. (R. L., Hawaii, Sec. 274.)

It is true that the Department has occasionally advised the Territorial authorities upon questions affecting public lands—but in all instances, at the request of those authorities. No case is known wherein the Department has assumed jurisdiction or proffered advice at the instance of an appellant, in land affairs.

While it is true that in respect to public lands under the administrative jurisdiction of the Department, a rule other than that apparently applied in the case of your client by the Territorial public land officers has been adopted (10 L. D., 475; 14 L. D., 568), it by no means follows that the public land laws of your Territory admit the application of such a rule. In any event, the question is within the power of the Territorial authorities to decide, without interference by this Department, either through appeal or otherwise.

Your appeal is accordingly dismissed and the papers are herewith returned to you.

COAL LANDS IN ALASKA—ACT OF MAY 28, 1908.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., July 11, 1908.**Registers and Receivers, United States Land Offices, and United States Surveyor-General, District of Alaska.*

GENTLEMEN: Herewith is copy of act of Congress approved May 28, 1908 (Public, No. 151), relating to existing unpatented coal claims in the District of Alaska.

CONSOLIDATION OF CLAIMS, MAXIMUM AREA.—The said act provides a method whereby qualified persons, their heirs or assigns, who initiated coal claims in Alaska prior to November 12, 1906, may consolidate their claims through the means of associations or corporations which may perfect entry and acquire title to contiguous locations, such consolidated claims not to exceed 2,560 acres of contiguous lands nor to exceed in length twice the width of the tract thus consolidated and applied for.

QUALIFICATIONS OF APPLICANTS FOR CONSOLIDATED CLAIM.—When application is made by an association of persons, each member thereof must be shown to be qualified to make entry under the coal land laws applicable to Alaska and to be the owner by location, inheritance, or purchase of an undivided interest in the consolidated claim. Proof of the qualifications of the applicants may consist of their own affidavits. The application for patent may be executed and filed by the duly authorized agent of the members of the association.

A corporation applying to consolidate its claims must show at date of application that not less than seventy-five per cent of its stock is held by persons qualified to enter coal lands in Alaska, and to this end each such application must be accompanied by a list of the stockholders, showing their respective holdings of stock in the corporation, and the personal affidavits of those holding such seventy-five per cent of the capital stock, showing their qualifications under the law. Applications by corporations must be signed by the president and secretary and attested by the corporate seal. All applications may be upon form 3-367, modified to suit conditions.

PENDING ENTRIES.—Claims embraced in unpatented entries, if the entrymen shall so elect, may be consolidated into a single entry under this act, upon presentation of a proper application therefor, within twelve months from date hereof. In the event of such consolidation, no further payment, publication of notice, nor any new or additional survey of the claims embraced in the consolidated entry, will be required; but the application must be accompanied by a plat of the

claims as consolidated, by proof of the qualifications of the applicants, and by evidence of the assignment of the claims to the applicants.

ASSIGNMENTS.—Assignments to individuals or corporations under the provisions of the act of May 28, 1908, must be executed in accordance with local requirements, and all applications be accompanied by abstracts of title properly certified.

SURVEYS.—Where locations already surveyed are sought to be consolidated, the application must be accompanied by a plat showing the separate locations included in the consolidation and their relation to each other. One entry may then be made for the consolidated claim. Where unsurveyed claims are consolidated, the survey may describe the exterior limits of the consolidated claim as in the case of the survey of one location, but the field notes of survey must be accompanied by duly certified copies of the location notices of the included claims and must show that the survey is made substantially in accordance with the aggregate locations. Consolidated claims need not be surveyed in perfect squares or parallelograms, but the length of the consolidated claim must not exceed twice the width, length and width to be measured in straight lines.

TIME WITHIN WHICH APPLICATION TO ENTER MUST BE MADE.—Application for patent for consolidated claims may be accepted if filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension between November 12, 1906, and August 1, 1907 (Circular, May 16, 1907, 35 L. D., 572). In case of consolidation of claims, including both claims for which no application for patent has been filed and claims for which applications have been made, the application under the provisions of this act must be filed within three years from date of the latest recorded notice of location of the included claims, exclusive of the period of suspension hereinbefore mentioned. In case of consolidation of claims for all of which applications for patent have already been filed, final proof, payment, and entry must be made within six months after the expiration of the period of six months prescribed by section 3 of the act of April 28, 1904, for the filing of adverse claims, has elapsed, in case of all the included applications, or within six months after the final adjudication of the rights of the parties in adverse suits instituted with respect to any or all of such included applications: Provided, that in those cases wherein the time here specified has expired, applications to consolidate must be filed within six months from date hereof.

SECTION THREE OF ACT.—Inasmuch as section three deals exclusively with such coal lands or deposits as shall have been *purchased* under this act, its interpretation seems more properly to fall within the

province of the Department of Justice, and it is deemed inadvisable for this Department to attempt at this time to define its provisions.

ACT APRIL 28, 1904, 33 STAT., 525.—So far as not in conflict with or superseded by the act of May 28, 1908, the act of April 28, 1904, will govern the survey, application, and entry of the coal claims described in these instructions.

PATENTS.—Patents issued under the provisions of the act of May 28, 1908, will contain recitals of the terms and conditions imposed by sections 2 and 3 of the act.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

[PUBLIC—No. 151.]

AN ACT To encourage the development of coal deposits in the Territory of Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated and for this purpose such persons, their heirs or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: *Provided*, That no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

SEC. 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.

SEC. 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trustee, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual,

partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the Attorney-General of the United States in the courts for that purpose.

SEC. 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof.

Approved, May 28, 1908.

LOCATIONS OF WARRANTS, SCRIP, ETC.—ACT OF MAY 29, 1908.

SANDY D. BULLOCK.

Only locations made upon lands which were subject to private cash entry at the time of the passage of the act of March 2, 1889, are recognized and protected by the ruling in the Roy McDonald case and validated by section 12 of the act of May 29, 1908.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, July 11, 1908.* (E. F. B.)

Sandy D. Bullock appeals from the decision of your office of April 22, 1908, holding for cancellation his location made June 13, 1905, of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 29, T. 5 S., R. 12 E., New Orleans, Louisiana, with surveyor-generals' scrip No. 1049-D, issued by the surveyor-general of Louisiana under the act of June 2, 1858 (11 Stat., 294). You held the location for cancellation for the reason that said scrip can only be located on lands subject to sale at private entry at a price not exceeding \$1.25 per acre, and that the land applied for, not having been offered since the act of July 4, 1876 (19 Stat., 73), is not subject to location with said scrip.

Appellant alleges that your office erred in holding that the land had not been offered subsequent to the act of July 4, 1876, and that is the controlling question in the case, as the 12th section of the act of May 29, 1908 (Public, No. 160), legalized all locations made with surveyor-generals' scrip where the application to locate was made between June 5, 1901, and June 20, 1907, and where such locations would be subject to approval for patent under the ruling of the Department in the case of Roy McDonald, rendered December 21, 1907 (36 L. D., 205). The object of the act was to legalize locations of such scrip upon lands not subject to private cash entry at the date of the location, where under the decisions of the Department the land was recognized as being subject to such location, provided the location was otherwise made in accordance with the rules and regulations of your office in such cases.

The decisions referred to are the decisions in the case of Victor H. Provensal (30 L. D., 616), rendered June 5, 1901, and other cases following, involving the same question, which held in effect that if the

land was subject to private cash entry at the time of the passage of the act of March 2, 1889 (25 Stat., 854), withdrawing from private cash entry all public lands of the United States, except in the State of Missouri, they were not withdrawn from location with surveyor-generals' scrip or other scrip or warrants locatable only on lands subject to private cash entry for the reason that Congress did not intend by such withdrawal to impair or curtail any of the privileges secured by the acts under which such scrip and warrants were issued.

Following that ruling it was the practice of the Department to allow locations of this scrip to be made on lands which at the date of the act of March 2, 1889, were subject to private cash entry, notwithstanding the withdrawal from private cash entry of all public lands of the United States, except in the State of Missouri, as declared by the act of March 2, 1889, and that practice continued in force until the decision in the case of Lawrence W. Simpson (35 L. D., 399), in which it was held that the withdrawal from private cash entry of all public lands except within the territory named in the act was absolute, and that the construction given to the act by the decision in the Provensal case cannot be sustained. It however protected locations made upon faith of the decisions in the Provensal and similar cases by innocent purchasers who acquired title after the dates of those decisions, but upon review (35 L. D., 609), it was held that the executive department was without authority to recognize the validity of location of such scrip on any public lands other than lands subject to private cash entry at the date of the location and that relief must be sought at the hands of Congress.

The question again came before the Department in the case of Roy McDonald *et al.* (36 L. D., 205), and it was therein directed that recognition be given to all locations completed under the faith and in the light of the decisions of the Department where the only objection to the validity of the location is that the land is not within the territory excepted from the withdrawal and where the location comes within the saving paragraph in the original Simpson decision.

Then came the act of May 29, 1908 (Public, No. 160), the purpose of which (section 12) is to confirm the action of the Department of December 21, 1907, protecting locations made at the date of the decisions in the Provensal case (June 5, 1901) and in the Simpson case on review (June 20, 1907), where such locations were made in accordance with the rulings of the Department in the case of Roy McDonald, and are otherwise in accordance with the rules and regulations provided in such cases.

No case comes within the ruling in the case of Roy McDonald or is protected by the act of May 29, 1908, where the land was not subject to private cash entry at the time of the passage of the act of March 2, 1889, as the Provensal case did not recognize the validity of any

location that was made on lands not subject to entry at that time, or which had not been subjected to private cash entry at the time of the location.

The land applied for by appellant had twice been offered prior to July 4, 1876, but by the act of Congress of that date (19 Stat., 73; section 2303, Revised Statutes), which confined the disposal of lands in Louisiana and other states named therein to the provisions of the homestead law, was repealed, and it was therein provided "that the public lands affected by this act, shall be offered at public sale, as soon as practicable, from time to time, and according to the provisions of existing law, and shall not be subject to private entry until they are so offered."

By the act of March 3, 1877 (19 Stat., 344, 357), an appropriation was made by Congress for the publication of proclamations relating to the sales of public lands in Louisiana and other southern states, as authorized by said act of July 4, 1876, and with the appeal there is exhibited copy of a proclamation under date of May 8, 1879, giving notice of a public sale of public lands in said State, including the land in question, to be held at the land office in New Orleans, August 26, 1879. This copy is certified by the register and receiver of the local office at New Orleans as being "a true and correct copy of the original clipping from the 'New Orleans Times' of July 9, 1879."

It appears from the record that when this application came before your office, the local officers were instructed to advise your office whether their records show any offering of this tract subsequent to the act of July 4, 1876, to which they responded that the records of their office "do not show the land as ever having been offered." You state that the records of your office show that the land was offered in 1830 and again in 1833, but they do not show that it has been offered since July 4, 1876.

The fact that an appropriation was made for publication of proclamations of sale authorized by the act of July 4, 1876, and that the publication of a proclamation for the sale of lands in Louisiana including the land in question was made, is strong *prima facie* evidence that the lands were offered under such proclamation. If so, the location in question having been made July 13, 1905, would come under the ruling in the Roy McDonald case and the act of May 29, 1908, if valid in other respects save as to the status of the land, and should be determined in the light of that decision.

As it can not be determined whether the land was in fact offered under the proclamation of May 8, 1879, the case is remanded to your office for further investigation and to be disposed of under the views herein announced.

STATE SELECTIONS—MINERAL LANDS—PUBLICATION OF NOTICE.

BLAKE ET AL. *v.* STATE OF IDAHO.

Under the circular of November 27, 1896, requiring publication of notice of State selections in all cases where the lands are within a township containing any mineral entry, claim or location, it is not incumbent upon the State to publish such notice until notified to do so by the local officers.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, July 11, 1908.* (E. O. P.)

James W. Blake *et al.* have appealed to the Department from your office decision of March 10, 1908, rejecting their application to contest the selection by the State of Idaho, per list No. 4, on account of the grant made by the act of July 3, 1890 (26 Stat., 215), for university purposes, of certain tracts in T. 35 N., R. 4 E., Lewiston land district, Idaho.

The State's selection was filed June 6, 1902, and included other land than that involved in this controversy. By letter of September 27, 1907, you advised the local officers that—

In list No. 4, filed June 6, 1902, of selections by the State of Idaho for university purposes, are certain tracts in T. 38 N., R. 4 E., the mineral return of which, by the surveyor-general, is sufficient to require publication and posting of notice of the State's selections—

and directed them to notify the proper officer of the State that in the event proof of such posting and publication was not filed within ninety days from notice the selections would be canceled. It is admitted that this order was complied with by the State.

Prior to the publication of this notice the several contest affidavits were filed, the grounds upon which they rest being set forth in your office decision. The charge that the State has selected land in excess of the amount due it under its grant requires only an examination of the records of your office to sustain or refute it and a hearing is unnecessary. Your office found from such examination that the charge was not well founded and the contestants on appeal here do not question the correctness of that finding. It is therefore eliminated as an element in this controversy.

The charge that the State failed to publish notice of its selection as required and that its rights thereunder are subordinate to those of the timber and stone applicants is overcome by the admission that the order directing posting and publication was complied with, and unless that order was not warranted and compliance therewith was of no force or effect, a contest based upon the charge must also fail.

It is contended by appellants that the State should have proceeded promptly with the publication without waiting for any call upon it by the land department and that inasmuch as it did not do so until

after the filing of the applications to contest, the alleged defect in its selection could not be cured. The circular of November 27, 1896 (23 L. D., 459), in force at the time the selection was presented, required in cases where the selected tracts were within a mineral belt or proximate to a mining claim that a satisfactory nonmineral affidavit accompany the selection, and further—

If any of the lands selected are found, upon examination, to be within a township containing any mineral entry, claim or location, you will at once notify the proper State officer as to the specific tracts, and require him to at once publish notice in some newspaper of general circulation (to be designated by you) within the vicinity of said lands.

A nonmineral affidavit accompanied the original selection and it is not contended that it is insufficient or unsatisfactory. Under the plain language of the circular, above quoted, it was not incumbent upon the State to publish notice of its selection until called upon to do so by the local officers. If publication were required in every instance a duty might rest upon the State to take the initiative. This, however, is not the case as there is no necessity for publication unless examination discloses that the land selected is "within a township containing any mineral entry, claim or location." This examination is to be made by the land department preliminary to the call upon the State to publish notice and until the State is notified to publish, it is not required to do so. As to the tracts here involved it is clear that the State has taken all the steps necessary to perfect its selection.

The matters set up as grounds of contest present no sufficient reasons for rejecting the State's selection, and the order of your office rejecting the applications of appellants is hereby affirmed.

RECLAMATION ACT—WITHDRAWALS UNDER FIRST AND SECOND FORMS.

ORDER.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., July 13, 1908.

It is hereby directed that where the Secretary of the Interior by approval of farm unit plats under the provisions of the act of June 17, 1902 (32 Stat., 388), heretofore or hereafter given, has determined, or may determine, that the lands designated thereon are irrigable, the filing of such plats in the office of the Commissioner of the General Land Office and in the local land offices, shall be regarded as equivalent to an order withdrawing such lands under the second form under said act, and as an order changing to the second form any withdrawal of the first form then effective as to any such tracts. This shall apply to all areas shown on farm unit plats as subject to entry under

the provisions of the Reclamation Act or as subject to the filing of water-right applications.

Upon receipt of the plats above described, appropriate notations of the change of form of withdrawal must be made in accordance herewith upon the records of the General Land Office and of the local land offices.

FRANK PIERCE, *Acting Secretary*.

SOLDIERS' ADDITIONAL-APPROXIMATION-COMBINATION OF FRACTIONAL PORTIONS OF RIGHTS.

GEORGE E. LEMMON (ON REVIEW).

The law does not contemplate, and the Department has never authorized or sanctioned, the location of combinations of fractional portions of different soldiers' additional rights in such manner that by aid of the rule of approximation an amount of land only a trifle less than double the area of the combined rights might thereby be taken; and locations so made are therefore not entitled to equitable consideration on the claim that they were made in faith of departmental construction of the law.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 13, 1908.* (P. E. W.)

Counsel for George E. Lemmon has filed a motion for a review of departmental decision of May 13, 1908 (36 L. D., 417), affirming your office decision of January 10, 1908, wherein you rejected his application to enter, under sections 2306 and 2307 of the Revised Statutes, the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ (lot 3), Sec. 27, T. 23 N., R. 17 E., Rapid City, South Dakota, containing 39.65 acres, based on the soldiers' additional homestead rights of James W. Hughes for 6.51 acres; Franklin H. Stallman for 1.89 acres; William Willard for 5.78 acres, and John Blundell for 5.71 acres, the latter right being offered as a substitute for the rejected right of Robert Patrick, previously offered for 5.84 acres.

Rejection was upon the ground that the excess of land sought to be located is far greater than the average acreage of the rights tendered.

The motion presents and relies upon four contentions, namely, that the said decision—

First. Fails to appreciate the destruction by said decision of property values created by the decisions and practice of the land department, not under a law of Congress.

Second. Fails to give due consideration to the late Roy McDonald decision (36 L. D., 205), which deprecates sudden changes of decisions and regulations, especially when retroactive in effect.

Third. Fails to note that an application to make homestead entry with uncertified soldiers' additional rights is equivalent to, or on the same basis with, the location of a military bounty land warrant.

Fourth. Fails to specify a date in the future when the new rule of approximation as applied to combinations of fractional soldiers' additional homestead rights shall go into effect.

It is added that—

This motion is made especially for the purpose of saving and protecting property rights embraced in the many applications involving these combinations which have been on file and unacted upon in the General Land Office for one to two years or more.

Applicant asks that all these old cases be adjudicated under the former rule under which they were filed and a date be specified in the future in which the new rule, if persisted in, shall become effective.

Inasmuch as the Constitution vests exclusively in Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," and it is manifestly impossible that any "property values" in lands could be "created" otherwise than under a law of Congress, it will be assumed that in his first assignment of error movant refers to property values or rights *acquired upon the faith of* "the decisions and practice of the land department," in construing the law.

The application in question was transmitted to your office June 2, 1906. Up to that date the soldiers' additional right created by legislation which was carried into the Revised Statutes as sections 2306 and 2307 had been held transferable in the case of *Webster v. Luther* (163 U. S., 331), divisible into any desired fractional portions in the case of *William C. Carrington* (32 L. D., 203), and combinable with other such fractional rights in *Ole B. Olsen* (33 L. D., 225). But as early as July 23, 1903, the Department had said, in the case of *William C. Carrington*, *supra*, with reference to such fractional rights and the application thereto of the rule of approximation:

But while Congress intended to donate to each of the persons described in the act a right to enter "so much land as when added to the quantity previously entered shall not exceed one hundred and sixty acres," it was not intended to give him a right to enter any greater quantity of land than that mentioned in the act, and this Department has authority to adopt such regulations with regard to the allowance of additional entries under such statute as will carry out the purpose of the act and at the same time prevent its use as a means of evading other statutes enacted to regulate the manner of disposing of the public lands.

Among such "other statutes" was the act of March 2, 1889 (25 Stat., 854), forbidding cash sale of any lands not in the State of Missouri, and in view thereof the circular of August 7, 1903 (32 L. D., 206), directed that—

Hereafter in allowing soldiers' additional homestead entries under sections 2306 and 2307 of the Revised Statutes of the United States; the rule of approxi-

mation will be applied only when the entire additional right, originally due to the soldier, his widow, or orphan children, is offered as a basis for the entry. If part of the right is located upon a tract of land agreeing in area with such right surrendered or located, then this circular will not prevent the application of the rule of approximation as to the remainder *if offered in its entirety as a basis for the entry.*

This regulation sufficed to prevent the use of such rights "as a means of evading" the said act of March 2, 1889, *supra*, so long as only one such right was allowed to be located on one tract of land. But in the case of Ole B. Olsen, *supra*, where one person had become the assignee of several such fractional soldiers' additional rights, the Department said:

If he be required to make a separate entry for each fractional part of a right, such requirement would not only entail upon the officers of the land department a large amount of unnecessary work, but would greatly impair the value of such rights, because it would be difficult to find tracts of vacant land corresponding in amounts with such fractions of rights.

With the express proviso that the rights so owned and used must "equal in the aggregate the amount of the land so located upon," it was held that "the assignee of two or more soldiers' rights of additional entry may locate them as one right upon the same tract of land."

In that case *unsurveyed* lands were involved and the rule of approximation was not in question, hence the said proviso could have purpose and effect only as continuing and furthering the rule, fully considered and plainly announced in the case of William C. Carrington, *supra*, and in said circular, *supra*, to prevent the private purchase of land in evasion of the said act of March 2, 1889, *supra*. This proviso, manifestly unnecessary in the case of *unsurveyed* lands, was intended to apply as a safeguard in cases of *surveyed* lands where the rule of approximation might be invoked; and in requiring that the aggregate of rights should equal the acreage applied for, the purpose was to bar any application of the rule of approximation in cases where a number of fractional rights were combined in one base.

Of this decision, with such express proviso, movant says in his present brief:

Prior to the Olsen decision fractional soldiers' rights were a drug on the market because proper lots were difficult to find Immediately thereafter, soldiers and their heirs, entitled to these small rights, were eagerly sought and were paid \$2 to \$5 an acre.

Thus the purpose of said decision was reached in providing a method whereby each remaining fractional soldiers' additional right, however small, found a market. But here its scope and benefit properly ended. The original beneficiaries of the Congressional grant, in acknowledgment of whose military services the "gift" was bestowed, had now reaped the final benefit therefrom. The said proviso

was a limitation, advisedly made, upon the purchasers of such fractional rights. Yet it is gravely argued herein that in other hands there shall now be added to each such fractional right an "unearned increment," "only a trifle less" than the right itself; that the "decisions and practice" which, having in view the enhancement of the value of this gift to the soldiers culminated in the privilege to combine and thus render marketable the fractional remnants of their said rights which singly could not be located and were therefore unsalable, should now be enlarged to double their granted value in the hands of the speculative purchasers thereof. Thus movant states that "parties have bought and sold combinations of soldiers' rights of a little over 20 acres on the promise to take 40 acres or lots of a trifle less than double the area of the combination of rights."

If said express proviso has been overlooked or disregarded, and if, as urged in the present motion and arguments, purchasers of such fractional soldiers' additional rights have hoped or have assumed, no matter on what basis, that with each such fractional right there would be allowed an application of the rule of approximation and that instead of furnishing rights which "equal in the aggregate the amount of the lands so located upon" they need only furnish rights which in the aggregate barely exceed one-half of the amount of the land located upon, this does not alter the fact that, as said in the case of George P. Wiley (36 L. D., 305):

Conceding the utmost liberty in the disposal of this "unfettered gift" it is still the duty of the Department to provide means for preventing its use in a manner evasive of other statutes relating to the disposal of public lands.

Following that decision, the one in question held that—

In applying the rule of approximation in cases where the assignee of two or more fractional portions of different soldiers' additional rights combines and applies to locate them on one body of land, the rights will be severally considered, and where the excess of land applied for is less than the average of the rights sought to be used, the entry may be allowed.

This decision impairs no rights and destroys no property values which ever had actual existence under the legislation in question and the departmental decisions thereunder.

Second. The applicability and the effect of the decision in the case of Roy McDonald (36 L. D., 205), in connection with this and like cases, were fully considered in the case of William C. Stayt (36 L. D., 530). The Department said:

Thus it clearly appears the warrant there in question (case of Roy McDonald, *supra*) had been acquired and located in reliance upon a long-standing and departmentally-adjudicated construction of the statute and upon the fact that patents had been and were being issued upon similar locations.

In the case under consideration on the contrary, there has never been any law or published departmental regulation or decision expressly authorizing the combination of several soldiers' additional rights in a location upon a tract of

land nearly twice as large as the aggregate acreage of such rights, by aid of the rule of approximation. Neither have the progressive steps in the history of this right given warrant for the claim sought to be asserted.

This disposes of movant's third contention that an application to locate a soldiers' additional homestead right is equivalent to the location of a military bounty land warrant, and his fourth contention that a future date should be fixed for putting in effect "the new rule of approximation as applied to combinations of fractional soldiers' additional rights," and that all pending cases "should be adjudicated under the former rule under which they were filed," were considered and disposed of in the case of *George E. Lemmon* (36 L. D., 543), where it was held that—

The rule of approximation permitted in the location of soldiers' additional rights is a purely administrative equitable rule, not founded upon any law, and can not be insisted upon as an absolute right; and where the privilege is abused to accomplish an evasion of positive law, the land department has full power to change the rule to prevent the abuse; and entries procured through such abuse of the rule are not entitled to equitable consideration on the ground that they were made under authorized existing practice.

No error being shown and none otherwise appearing, the Department adheres to its said decision. The motion is accordingly hereby overruled.

MENOMINEE INDIAN RESERVATION—TIMBER—"EXTRAORDINARY EMERGENCY"—ACT OF AUGUST 1, 1892.

OPINION.

The fact that certain logs on the Menominee Indian reservation may be rapidly decreasing in value because of deterioration and decay, and that their further deterioration, and the consequent financial loss to the Indians, can be prevented only by overtime labor in immediately manufacturing them into lumber, does not constitute an "extraordinary emergency" within the meaning of the act of August 1, 1892, forbidding more than eight hours of work per day by laborers employed by the government except in cases of extraordinary emergency.

First Assistant Attorney Clements to the Secretary of the Interior,
(W. C. P.) *July 14, 1908.* (C. E. W.)

You have referred to me a certain memorandum relating to logs on the Menominee Indian reservation, Minnesota, requesting my opinion as to whether or not the facts presented indicate the existence of such an "extraordinary emergency" as to justify the extension of hours of labor beyond the statutory eight hours (Act of August 1, 1892, 27 Stat., 340).

Said act provides:

That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the

public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

The memorandum submitted shows the following facts:

There is approximately \$600,000 worth of logs on said reservation rapidly decreasing in value because of deterioration. The immediate manufacture of the logs into lumber will alone save them from further deterioration. Every day's delay results in a serious financial loss to the Indians. The act of March 28, 1908 (Public, No. 74), provides for their manufacture into lumber at sawmills to be erected under the direction of the Secretary of the Interior. The construction of these mills is under way. Under a ruling of the Attorney-General (June 8, 1908) the men engaged in the operations now in progress are employees within the purview of the "Eight Hour Law," *supra*. It is alleged that it is impracticable to work more than one crew of men each day. Therefore the only way by which this depreciation in the value of the logs can possibly be lessened is by requiring, or permitting, these employees to work at least ten hours each calendar day until the mills are constructed and the logs have been placed in the rivers and driven to the various mill-sites for manufacture. The longer day's work must be required of those engaged not only in the construction of mills, but in river improvement work, building dams and booms, clearing channels and driving logs.

Do these facts present an "extraordinary emergency" within the meaning of the "Eight Hour Law?"

"Emergency" has been defined by the courts as "any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency" (*People v. Supervisors*, 21 Ill. App., 271); "a sudden or unexpected happening; an unforeseen occurrence or condition." (*Sheehan v. City of New York*, 75 N. Y. Supp., 802.)

"Extraordinary" means "beyond or out of the common order or rule; not usual, regular, or of an ordinary kind; remarkable; uncommon, rare." (*Ten Eyck v. P. E. Church*, 20 N. Y. Supp., 157.)

"Extraordinary emergency" not only implies the sudden or unexpected happening of some occurrence or condition not to be foreseen, but that occurrence or condition must be out of the ordinary, uncommon, rare, beyond the common, usual order of events.

More difficulty than was expected in obtaining certain materials called for in the contract, causing such delay that hurry and rush and overtime were consequent, does not constitute an "extraordinary

emergency" within the meaning of the act. (*Ellis v. U. S.*, 206 U. S., 246.)

The term "imports a sudden and unexpected happening; an unforeseen occurrence or condition calling for immediate action to avert imminent danger to health, or life, or property; an unusual peril, actual, not imaginary, suddenly creating a situation so different from the usual or ordinary course in the prosecution of the public work that the court may and must conclude that Congress contemplated excepting from the operation of the law such an occurrence, so sudden, rare, and unforeseen." (*Penn Bridge Co. v. U. S.*, 29 App. D. C., 452.)

In that case, involving the construction of a bridge in this city, the specifications were changed after date of contract requiring the constructing company to put in a certain amount of concrete masonry within a time limited. The company contended that it was not possible to do the work within a period of eight hours' daily work, because if the work was stopped at the end of eight hours the concrete would harden and might be cleft, causing cracks and perhaps disintegration of the arch. The court thought the contracting parties should have known these facts in undertaking the work; certainly the circumstances did not constitute "an extraordinary emergency."

In *U. S. v. Sheridan-Kirk Contract Co.*, 149 Fed Rep., 809, the court held:

An "extraordinary emergency" in connection with the building of a dam across the Ohio river cannot be construed as a *continuing* emergency, which would suspend the eight-hour law during the entire life of the contract, nor an emergency growing out of the scarcity of labor, nor can it be made to include, not only the time of the happening of a flood, but also the time required to repair the injuries resulting therefrom; but it is such an unforeseen, sudden, or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases.

"In all cases it must be taken into consideration that an extraordinary emergency results only from conditions unforeseen and therefore not provided for in advance or considered in planning the work." (24 Op. Asst. Atty. General, Int. Dept., 135, 142.)

It is impossible to place the manufacturing of logs on the Menominee Indian reservation in this category, however desirable it may be to avoid loss by deterioration. These logs have been cut from year to year and have accumulated. Under a recent act of Congress, authority is given to erect sawmills and manufacture these logs into lumber. The conditions must have been known; the logs were already cut, and any one, including Congress, is bound to know that the value of logs decreases because of deterioration, decay, etc., under such cir-

cumstances. It cannot be said that the condition was unforeseen or that it is at all out of the usual order of events. Furthermore, the condition, if it be an emergency, is continuing in character. Overtime labor is not contemplated for a day, a week, or a month, but until the logs are so placed that they may be milled. The authorities cited are strongly opposed to the proposition.

If the contention that an extraordinary emergency exists in connection with this work on the Menominee reservation, under the circumstances stated in the note, is sound, then it might successfully be urged that in the construction of a public building, which when finished would house a government bureau now occupying rented quarters, an "extraordinary emergency" existed because the sooner the building be completed, the sooner would rent cease, and financial loss to the government (in the way of rents) be averted.

If in the course of saving those logs a forest fire threatened the safety of some logs which by working overtime might be removed and thus saved, that might constitute an "extraordinary emergency." But loss from decay and the effects of exposure are usual, ordinary, occurrences in logging and cannot be the foundation of such an emergency as the act contemplates. Were it otherwise, such an "extraordinary emergency" might be easily created at any time by cutting more timber than could well be taken care of in a season; thus defeating the purpose of the act.

I am of the opinion that the circumstances would not justify the employment of men for more than eight hours work per day.

Approved: _____

FRANK PIERCE,

Acting Secretary.

**PRACTICE—REGISTER OR RECEIVER AS WITNESS IN CONTEST CASE—
REHEARING.**

CALDWELL v. JOHNSON.

Where the register or receiver is sworn as a witness and testifies as to a disputed fact at the hearing in a contest case, he should not act in his official capacity in the decision of the case.

*First Assistant Secretary Pierce to the Commissioner of the General
Land Office, July 20, 1908. (J. F. T.)*

Alfred N. Johnson has appealed to the Department from your decision of February 17, 1908, sustaining the action of the local officers of August 28, 1907, and holding for cancellation his homestead entry number 1221, made December 9, 1905, for the NW. $\frac{1}{4}$, Sec. 11, T. 2 S., R. 1 W., U. M., Vernal, Utah, land district, on the contest of Irvin M. Caldwell.

The contest affidavit was filed May 9, 1907, and charges failure to either establish or maintain residence upon the land and total abandonment thereof.

An uncorroborated affidavit of contest was accepted by the local officers, and notice of contest issued thereon. This was irregular, but is not in and of itself alone such error as to compel, nor in all cases justify reversal. The affidavit of contest, though not very accurate in expression, sufficiently charges default as to residence.

The question in controversy upon the trial, at which both parties appeared in person and by counsel, was as to whether the actual residence of contestee during the lifetime of his entry and at the date of service of contest notice had been upon the land, or at the town of Vernal, Utah, some eighteen miles distant therefrom.

In the view taken of the case by the Department, only one other matter need be now considered.

After the testimony had been submitted and both parties had "rested," the register, who with the receiver was trying the case, announced:

It happens that I have personal knowledge of some matters which to me appear material to the issues joined in this case, and a part of that knowledge is about matters that the record shows are in dispute, and about which the testimony is conflicting. I have been thinking very seriously concerning what my duty in the matter should be. I have been unable to make up my mind exactly what I ought to do under the circumstances. There is no question but what the knowledge I have would influence my judgment, and I am hesitating and have hesitated, hoping that these matters would be cleared up in the record. Sometimes I feel as if I ought to be sworn and testify in the record myself in order to make my knowledge of record. At other times I feel that it is no part of my duty to make a case for either side. I have consulted with the receiver about it, and he is as much in doubt as I am. I want to think this matter over a little bit longer, and before this case is finally closed as far as testimony is concerned, I think that I will have to submit my testimony as a part of the record. I was in hopes that this testimony would straighten itself out from the witnesses here without any interference by myself.

The case was then continued to the following day, when the register being sworn as a witness gave his testimony, which was very important and strongly in favor of contestant. The closing sentence of his testimony in chief is:

On the day the contest was filed against this contestee I saw the contestee in Vernal, Utah, between the hours of 12 and 2 o'clock, just the exact time I am unable to state.

This statement was adhered to upon cross-examination, but was directly contradicted by three witnesses, one of whom was the contestee. The fact of contestee's whereabouts upon the day in question was important, as he claimed to have then been for some days upon his entry. It is more important, however, to notice that a question of veracity or of accuracy as to memory was thus raised between a party to the case and one of the triers of fact.

This could not fail to prejudice the case of the contestee, which in the very nature of it depended largely upon his own testimony.

No objection was interposed to a statement being made by the register, and this would naturally be the case, as neither party would be likely to appear in opposition to a trier of fact before whom his case was pending, and this proposition alone is sufficient to warrant an order for a rehearing of this case.

The Department is not willing to sanction the practice of permitting one of its officers to testify as to a disputed fact upon a hearing and then act in his official capacity in the decision of the case.

In the rehearing of this case all technical questions should be removed and all the facts concerning this entry from its inception to the date of such rehearing fully presented.

Your decision, so far as cancellation of this entry is concerned, is set aside, and the case is returned to your office for further proceedings in accordance with the views herein expressed.

**PROFFERED RAILROAD SELECTION—PRIOR PENDING APPLICATION—
EFFECT OF ENTRY.**

LEETE v. NORTHERN PACIFIC RY. CO.

The allowance of entry upon an application pending at the time of the presentation of a railroad selection for the same land is in effect a rejection of the proffered selection, and cancellation of the entry does not operate to revive the application to select, although never formally rejected, to the prejudice of the rights of an adverse claimant.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 20, 1908.* (E. O. P.)

Albert H. Leete has appealed to the Department from your office decision of November 2, 1907, holding for cancellation his timber and stone cash entry, completed July 6, 1906, of the NW. $\frac{1}{4}$, Sec. 10, T. 2 N., R. 6 W., Portland land district, Oregon, because in conflict with the selection by the Northern Pacific Railway Company, per Oregon City list No. 14, tendered July 13, 1900, under the act of March 2, 1899 (30 Stat., 993).

The facts material to a determination of the questions presented by the appeal, as set forth in your said decision, are substantially as follows:

September 13, 1899, Fred C. Baker presented homestead application for this tract, which was rejected by the local officers because in conflict with the prior application of one Shelton to make timber and stone entry thereof. Shelton never perfected his entry, and Baker having appealed, your office, by letter of September 25, 1900,

directed the allowance of his homestead application. Baker's entry was placed of record November 30, following. This entry was cancelled by relinquishment April 27, 1906, the same day Leete's timber and stone declaratory statement was filed. The railway company's selection tendered July 13, 1900, nearly six years before, appears never to have been rejected, and your office found that it was a pending application at the date Leete's declaratory statement was filed. Leete was called upon to show cause why the entry should not be cancelled and the claim of the company recognized as superior.

Leete contends that the selection of the company was in effect finally rejected when the entry of Baker was placed on record in the local office and that its right was not revived by the cancellation of that entry. In the opinion of the Department this position is a sound one.

Baker's application was presented prior to the tender of the railway company's selection. His application having been allowed his rights thereunder were superior to those of the railway company under its selection. After Baker's entry was properly placed of record the railway company's application to select was for land already appropriated and not subject to selection.

The allowance of Baker's entry cut off the rights of the company and in effect operated as a rejection thereof and the failure of the land department to formally take this action did not strengthen its claim to the land. The mere fact that an application or selection is pending at the date the bar to its allowance is removed adds nothing to the right acquired by the original filing of the application or selection as against an adverse claimant. It follows therefore that the rights of the railway company at the time Baker's homestead entry was cancelled and the timber and stone declaratory statement of Leete are no greater than those existing prior thereto. Disposition of the railway company's selection is controlled by the conditions existing at the date of its presentation. (*Eaton et al. v. Northern Pacific Ry. Co.*, 33 L. D., 426, 432, and cases cited.) At such time it could not properly have been approved and the subsequent allowance of Baker's homestead entry called for its rejection and the termination of the rights of the railway company thereunder. The failure to take proper action with respect thereto cannot operate to prejudice the rights of Leete, and in the absence of other objection his timber and stone entry should be held intact.

The decision appealed from is accordingly hereby reversed.

BOUNTY LAND WARRANT—SATISFACTION OF RIGHT—RECOGNITION
OF INVALID DUPLICATE.

ROY McDONALD.

After the obligation of the government has been satisfied with respect to a military bounty land right, the authority of the Commissioner of Pensions as to that claim is at an end; and a duplicate warrant thereafter erroneously issued by him upon such right is an absolute nullity, and no action on the part of the Commissioner of the General Land Office purporting to recognize such duplicate can give it validity, nor can a purchaser thereof be protected, however innocent he may have been as to any infirmity of title, and even though he may have purchased in faith of the recognition given thereto by the Commissioner of the General Land Office.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 22, 1908.* (E. F. B.)

This appeal is from the decision of your office of April 3, 1908, rejecting location of the N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, T. 4 S., R. 23 W., Camden, Arkansas, made November 17, 1904, by Roy McDonald with duplicate military bounty land warrant No. 24895, for eighty acres, issued under the act of 1855. The controlling question is as to the validity of the duplicate warrant with which the land was located.

The original warrant was issued March 6, 1856, to John L. Devane, private Georgia militia, Florida War. You state that it appears from an endorsement thereon it was assigned March 31, 1856, by the warrantee in Lowndes County, Georgia, (presumably in blank), the name of Seth M. Root, the warrantee, having been inserted in a different colored ink and handwriting, and that it was located June 18, 1856, by said Seth M. Root upon the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 4, T. 93 N., R. 23 W., Decorah, Iowa.

If the execution of the assignment in blank was the voluntary act of the soldier, and there is no ground for belief that it was otherwise, it conveyed to the purchaser all the right, title and interest of the soldier and the assignee was authorized to insert his name in the assignment as the true owner thereof and to locate the warrant in his name and for his benefit. Jake Salmen (35 L. D., 453). Upon the location of a warrant so assigned the right of the soldier is exhausted and the obligation of the government is satisfied. C. L. Hood (34 L. D., 610).

Notwithstanding the original warrant had been fully satisfied by location under an assignment in due form and regular in every respect, and that said location was returned to the General Land Office August 18, 1856, the Commissioner of Pensions, August 9, 1858, nearly two years and two months after the return to the General Land Office of the location of the original, improvidently issued a duplicate of said

warrant, which on August 21, 1858, was assigned by Devane to Theodore B. Edwards, who located it February 19, 1859, at La Crosse, Wisconsin. This location was suspended because of the location of the original warrant, and as the duplicate had been improperly issued, the Commissioner of Pensions, by letter of December 6, 1864, advised the Commissioner of the General Land Office that said duplicate land warrant "has been this day canceled and declared void as against the United States."

Thereupon the Commissioner of the General Land Office, by letter of December 12, 1864, advised Edwards of such action and that he would be allowed to secure patent for the land located by substituting a new warrant in lieu of the canceled warrant, which was done, and the canceled duplicate warrant was returned to the locator with the name of the Commissioner of Pensions cut out, and otherwise mutilated, and endorsed across the face in red ink: "This duplicate warrant has been this day canceled and declared void as against the United States." It was returned to the locator solely for the purpose of allowing him to use it for recovery of purchase money against his assignor.

In 1903 Harvey Spalding and Sons submitted this mutilated warrant to your office for approval of the assignment from Devane to Edwards and by letter of September 16, 1904, in which the reasons for the cancellation of said duplicate warrant were stated, Spalding & Sons were advised by your office that:

The validity of the transfer has not been questioned. The assignment of the duplicate warrant is undoubtedly *bona fide*, and the purchaser clearly an innocent one, and the attempted cancellation of the warrant being of no force or effect, this office will respect the right of Theodore B. Edwards, the said assignee, his heirs and assigns, to use or assign said warrant herewith returned.

Thereupon Edwin W. Spalding obtained from Benjamin E. Edwards, residuary legatee of Thomas B. Edwards, an assignment of said duplicate warrant, and on October 24, 1904, it was again submitted to your office with a copy of the will of Theodore B. Edwards, and a transcript of the proceedings of the court settling his estate, for examination and approval as to the assignment from Edwards to Spalding.

October 24, 1904, Spalding was advised by letter of your office of that date:

In view of the foregoing facts and that Edwards's assignment is regular in form and substance, it is sufficient to transfer the title to said Spalding, and his right to use or assign the warrant, herewith returned, will be respected by this office.

On the same day Spalding executed an assignment of said duplicate warrant to Roy McDonald of Hot Springs, Arkansas, who on November 17, 1904, located it upon the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, T. 4 S., R. 23 W., Camden, Arkansas.

Appellant urges in support of his claim that said warrant was purchased upon faith in the decisions of your office as to the validity of the assignment from Devane to Edwards and from Edwards to Spalding, and that under the rulings of the Department in the cases of Herbert D. Stitt (April 30, 1907) and Leon Moyse (June 24, 1907) he had a right to rely upon your decisions as to the validity of the warrant, and of his right to locate it.

The rule announced in those cases had reference solely to the determination by your office as to the validity and regularity of an assignment of a valid outstanding warrant, and there is no expression in either of them that affords the slightest ground for its application to unauthorized acts of your office assuming to give recognition to nullities. This was clearly set forth in the instructions of July 12, 1907 (36 L. D., 11). As stated in those instructions:

There is a wide distinction between the acts of public officials who transcend their power and authority and the erroneous acts of public officials who misjudge as to such matters.

The only question determined in the case of Stitt, and also in the case of Moyse, was whether there was sufficient evidence of ownership of the warrant by the locator to authorize him to locate or transfer the title (so far as the United States is concerned) to another. These warrants are assignable by deed or instrument in writing made according to such form and pursuant to such regulations as may be prescribed by your office.

In the circular of February 18, 1896 (27 L. D., 218, 219), the local officers are instructed that "*when the question of title is in doubt* they must decline to receive the warrants until the holders thereof have submitted the *same to this office* for examination and have obtained a favorable decision thereon." It was under this rule that the holders of the warrants in those cases submitted the question of title to your office. In the Stitt case it was said:

When this warrant was presented to your office by Kelley for approval of the assignment, you could properly have refused to be concluded by the adjudication of the court if you had not been satisfied that the warrantee had not parted with her interest. It is the province of your office to determine whether the assignments are sufficient independently of the adjudication of the courts. But in this case the judgment of your office has been exercised by your letter of September 1, 1903, which is practically a certificate of the validity of the assignment upon which third parties have acted. It is not deemed advisable that the question as to the regularity of the assignment of the warrant should be reopened after it has been located by a subsequent assignee and after the land has been purchased upon the certificate issued upon that location.

Such determination can not however affect the right of adverse claimants of the title who had no opportunity to be heard, nor can any one but a *bona fide* purchaser or holder of the warrant claim protection under such decisions. It is only when the warrant is

found in the hands of an innocent third party, or has been located by a holder who obtained title upon faith of your decision as to its validity, that the rule should be applied, and every fact and circumstance tending to show that such holder did not purchase without notice of the invalidity of his title, notwithstanding your decision, should be closely investigated.

The material question to determine in each case is whether the assignee or locator is a bona fide purchaser or owner of the scrip. If you have any substantial reason for believing otherwise in any case it should be investigated. (Instructions, 36 L. D., 11, 17.)

But as stated in the outset, the controlling question in this case is as to the validity of the duplicate warrant and not as to the regularity or sufficiency of the assignments under which the locator claims title.

It is true your office assumed to pass upon the question as to the authority of the Commissioner of Pensions to cancel the duplicate warrant. You determined that he had no such authority and that such duplicate warrant was a valid outstanding right in Edwards, the assignee of Devane. But your determination of that question can have no greater efficacy for the protection of a purchaser than the act of the Commissioner of Pensions in issuing it. Both acts were absolute nullities for the reason that there was no power in the Commissioner of Pensions to issue a duplicate warrant after the obligation of the government had been satisfied by the issuance and location of the original warrant, and it follows as a necessary consequence that your office had no authority to give it recognition. A purchaser of such warrant can not be protected, however innocent he may have been as to any infirmity of title.

However liberal may have been some of the rulings of the Department for the protection of innocent purchasers of warrants issued under a misapprehension, or on imperfect or false evidence, it has never been questioned that where a valid military bounty land warrant has once been issued the authority of the Commissioner of Pensions as to that claim is null and void (5 Op. Atty. Gen., 387; Andrew M. Turner, 34 L. D., 606; C. L. Hood, *Ib.*, 610; Instructions, 36 L. D., 11); especially where the location had been returned to your office and it appeared from the records that it had performed the office and the obligation of the government had been fully satisfied.

While McDonald, the locator, is not protected as an innocent purchaser in his title to a warrant that had no legal existence so far as to give any recognition whatever as to its validity, if his purchase was in fact made upon faith of the ruling of your office as to the validity of such warrant, and there is nothing in the record to indicate otherwise, there appears to be no reason why he may not be allowed to make substitution of a valid warrant as provided for in

rule 41 of the circular relating to location and assignment of military bounty land warrants (27 L. D., 218, 225) in cases where "a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon."

DESERT LAND ENTRY—AMENDMENT—PAR. 3, INSTRUCTIONS OF
FEBRUARY 29, 1908.

JENNIE M. MITCHELL.

Paragraph 3 of instructions of February 29, 1908, governing amendments of original entries, construed to embrace desert land entries.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 22, 1908.* (E. O. P.)

The Department has before it a protest made in behalf of Jennie M. Mitchell against the action of your office denying application to amend her desert-land entry of the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 3, T. 25 N., R. 69 W., Cheyenne land district, Wyoming, made December 29, 1906, by relinquishing all but the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 3, and taking in lieu thereof the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 2, same township and range. Mitchell also requested repayment of a part of the money paid on account of her original entry.

The case being one solely between the claimant and the government, the protest filed has been treated as an appeal from the action of your office to the end that the matter may be more speedily determined.

It is alleged in support of the application to amend that previous to making entry Mitchell employed a surveyor and based her selection of the land entered upon advice furnished her by him. After entry another survey was made and she discovered that none of the land included in her entry except the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 3 could be irrigated from the ditch upon which she relied for her water supply and which traverses the only practicable route for a ditch in the vicinity of the land. She further alleges that the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 2, which she seeks to secure by amendment can be irrigated from this ditch and that the tracts she offers to relinquish are free from any adverse claims. Her first year's proof shows that she has made the necessary expenditures upon the land entered. Her statements are corroborated and her good faith can not, from anything contained in the record, be questioned.

The decision of your office is in harmony with the rule in force at the time it was rendered. Since then, however, the Department has

adopted a general policy governing the allowance of amendments of original entries. (Circular, February 29, 1908, 36 L. D., 287.)

Mitchell's petition can only be considered under the third paragraph of said circular, as the matters relied upon by her do not bring the case within either the first or second paragraphs thereof. Said paragraph three reads as follows:

Where through no fault of an entryman, the lands embraced in an entry are found to be so unsuitable for settlement purposes as to make the completion of the entry impracticable, amendment may be allowed by eliminating one or more of the subdivisions entered and including other tracts in lieu thereof. But in such case at least, a legal subdivision approximating forty acres in area, of the land originally entered, shall be retained, and the entry as amended embrace contiguous tracts. The application to amend must be filed within one year from the date of the original entry.

While the language applies more particularly to homestead entries, the circular as a whole was intended to apply to "original entries" generally, and no good reason appears why amendment of a desert-land entry may not be considered thereunder. Mitchell's application was filed within a year after entry. Her mistake was not the result of failure to exercise due care in the examination of the land entered with a view to determining its susceptibility of irrigation. The amendment requested is made by eliminating some of the legal subdivisions embraced in the original entry while still retaining "a legal subdivision approximating forty acres in area," to which is added contiguous land. The whole matter considered, it is believed the case falls within the spirit of said paragraph three and that in the absence of other objection her application to amend should be allowed.

The petition for amendment is joined with an application for repayment of a part of the money paid on the original entry. This matter never having been considered by your office will not now be passed upon by the Department, but as to this feature the case is remanded for such action by your office as the matter seems to warrant.

The record informally withdrawn is herewith returned, your decision with respect to the application of Mitchell to amend being, for the reasons herein given, reversed.

METHOD OF KEEPING RECORDS AND ACCOUNTS RELATING TO THE PUBLIC LANDS.

ORDER.

DEPARTMENT OF THE INTERIOR,

Washington, June 1, 1908.

On the recommendation of the Commissioner of the General Land Office, the following changes in the method of keeping records relating to the public lands will take effect July 1, 1908:

1. Only one series of numbers will be maintained at each district land office for all classes of entries, purchases, selections, locations, etc., of the public lands.

2. The initial declaration, application, or other paper required in any entry, purchase, selection, location, etc., will be numbered at the time and in the order in which it is presented at the district land office, without regard to its subsequent allowance or rejection. All intermediate and final papers required to be filed or issued in connection therewith will be given the same number as the initial paper.

3. An alphabetical index of all declarants, applicants, entrymen, purchasers, selectors, locators, etc., will be maintained at the district land office where their initial papers are presented.

4. An alphabetical index of all declarants, applicants, entrymen, purchasers, selectors, locators, etc., will be maintained in the General Land Office.

5. A uniform receipt blank will be adopted for the use of receivers of public moneys. These blanks will be serially numbered, with one series of numbers for all receivers, before coming into their hands. Receivers will use only the blanks furnished them, and will be held strictly accountable for the disposition of each blank.

6. Receivers will issue receipts for all moneys received by them at the time the moneys are tendered.

7. A press copy of each receipt issued must be made before the receipt is delivered.

Detailed instructions in connection with the foregoing will be issued in due course by the Commissioner of the General Land Office.

JAMES RUDOLPH GARFIELD,

Secretary.

INSTRUCTIONS.

To Registers and Receivers, and Clerks of District Land Offices, and all other Employees under the General Land Office:

1. Under the foregoing order, the following instructions will take effect on and after July 1, 1908, in all district land offices:
2. All orders, circulars, and instructions in conflict herewith are hereby canceled and revoked.
3. The various series of numbers in use at each district land office for the numbering of declarations, applications, entries, purchases of land, selections, locations, etc., will be discontinued.
4. Each office will maintain but one series of numbers, and all kinds of applications, entries, selections, locations, etc., for the use, segregation, purchase, or disposition of a part of the public domain, and applications for the use of water under the Reclamation Act (32 Stats., 388) will be numbered with this one series.
5. Each office will start this new series with Number 01, and continue 02, 03, 04, etc. The "0" is used to prevent conflict with any number of the various series in use heretofore.
6. Each declaration, application, or other initial paper required in any entry, sale of land, selection, location, etc., will be numbered **AT THE TIME AND IN THE ORDER** in which it is presented or received at the district land office, without regard to whether it is subsequently allowed or rejected.
7. Applications, entries, proofs, etc., which are not accompanied by the money required by law or regulations to be tendered at the same time they are filed will not be numbered, or considered for the purpose of allowance or rejection.
8. The giving of a serial number to an application, entry, selection, location, etc., does not mean that same is allowed or approved, or will be allowed or approved. It is merely an identification number of the case, as it were, by which it will always in the future be identified.
9. After the initial declaration, application, or other paper required in any entry, sale of land, selection, location, etc., is once numbered, all subsequent papers filed or issued in connection therewith must bear the same number as is given the initial paper.

For example:

(a) If, on July 1, 1908, the first paper presented or received should be a homestead, reservoir, or coal declaratory statement, it will be numbered 01. Should any papers required in connection therewith be subsequently filed or issued, they will be given the same number as the declaratory statement, 01.

(b) Should the next application be a mineral application, it will be numbered 02; should the entry be allowed and certificate issue, the final papers will be given the same number as the application, 02.

(c) Should the next application be for timber or stone land, it will be given Number 03; should final proof be made and certificate issue, these papers will be given the same number, 03.

(d) Should the next paper presented be a desert-land declaration, it will be given Number 04; should yearly proofs be made and certificate issue, they will be numbered the same as the initial papers to which they relate, 04. If all the land embraced in a desert-land entry is assigned, the number of the entry will not be changed. If a part of the land is assigned, the first paper filed in connection with the partial assignment will be given the next current serial number.

(e) Should the next application be a homestead application, it will be numbered 05; should application to commute same be subsequently filed, it will be numbered 05; should final certificate issue in connection therewith, it will be numbered 05.

(f) Should the next be an application for the sale of an isolated tract, it will be given Number 06; should the application be allowed and the sale made, and certificate issue under the application, it will be given the same number, 06. If there should be more than one bid under the original application, each bid will not be given a separate number, but will take the same number as the application for the sale.

(g) Should the next application be a water-right application under the Reclamation Act by a "private owner," it will be given Number 07. If a homestead application or entry, made prior to July 1, 1908, is pending for land covered by a water-right application filed July 1, 1908, or subsequently, the pending homestead application or entry should be immediately given the next new serial number; and the water-right application the next number. If a water-right application accompanies a homestead application under the Reclamation Act, number the homestead application first, and let the water-right application take the next number. If the water-right application is filed subsequently, it will take the next current serial number.

(h) Should the next paper filed be a request for transcripts of records or plats, it will NOT be given Number 08, because it is not an application or paper applying for the use, segregation, purchase, or disposition of a part of the public domain.

(i) Should the next paper filed be an adverse mineral claim, it will be given Number 08; should the claim be subsequently allowed, it will retain the same number, 08.

(j) Should the next paper be a railroad or State selection list, under any act of Congress, it will be given Number 09, notwithstanding it is already numbered by the company or the State; should the list be

only partially approved, the list originally filed will always retain the number first given it, 09. If an amended or new list, involving different or additional tracts, is filed, it must be given the next current serial number when filed.

(k) Should the next number be an application to make second entry, it will be given Number 010, and all future papers filed or issued in connection therewith will be given the same number, 010. Applications to amend entries will take the same number as that given the original entry.

10. A record, in consecutive, numerical order, of all declarations, applications, entries, purchases of land, selections, locations, etc., will be kept in the SERIAL NUMBER REGISTER (Form 4-051, new), and all notations in regard thereto, except a contest record thereof, will be made in the Serial Number Register, under the proper number. Such notations as are required to be made in the tract books will continue to be made there, as well as in the Serial Number Register.

11. Contests will not take a number of this new series. The records of contests, until further advised, will be kept in the Contest Dockets, as heretofore. Notation should be made in the Serial Number Register of the initiation and close of a contest, as follows:

"July 1, 1908, Contest Affidavit filed. (See Contest Docket, p. 26.)
Dec. 4, 1908, Contest closed."

HOW TO TREAT PENDING APPLICATIONS, ENTRIES, ETC., MADE PRIOR TO JULY 1, 1908.

12. All declaratory statements, applications, selections, entries, proofs, etc., made before July 1, 1908, and still pending on that date, will retain the numbers given them under the old system of numbering, UNTIL the first letter, paper, or action, of any kind or character, is received or taken by YOU, in connection therewith, WHEN you will IMMEDIATELY give the case, as it were, the NEXT current new serial number. For the notation of the letter, paper, or action, and future record of the case (except a contest record), use the next page in the Serial Number Register, numbering it with the same number as that given the case.

For example:

If an application for leave of absence or a relinquishment in connection with an entry made prior to July 1, 1908, be filed, or such an entry be canceled, the pending entry will be given the next current serial number and a notation as to the application for leave of absence, relinquishment, or cancellation, will be made in the Serial Number Register.

13. The only exception to this rule of giving new serial numbers to entries initiated prior to July 1, 1908, will be when the first paper you receive is the patent or a notice of issuance of patent thereon. In such case a new serial number will NOT be given the old entry.

14. In this way all cases pending prior to July 1, 1908, bearing old numbers, will gradually be given the new serial numbers, and filing under two systems of numbering will not be necessary.

15. When the register sends in the monthly "Schedule of Serial Numbers" hereinafter referred to, he will make notations in the Remarks column, of the old number by which the application, entry, proof, etc., was identified.

16. When you give an application, entry, proof, etc., which was made prior to July 1, 1908, a new serial number, make notation, on the proper record book which you kept prior to July 1, 1908, of the new serial number given it. It is advisable to make similar notation of the new serial number on the tract books at the same time it is made on the old numerical record, such as the Homestead, Desert Land, and Cash Registers. It is not necessary to copy the entire old record in the serial number register, but the kind, name and address, description of the land, and all future notations (except a contest record) in regard thereto must be entered in the Serial Number Register. Such notations as are required to be made in the tract books will continue to be made there, as well as in the Serial Number Register. All that is necessary to note on the old Record Books is the new serial number, as "0567," the "0" signifying that it is the new number. The date it is given that number is determined from the Serial Number Register, which bears the date of the first notation made under the new number.

17. In all notices to be served, posted, or published in connection with applications, entries, etc., made prior to July 1, 1908, you MUST include both the old and the new numbers, as follows: "Homestead Entry, No. 4137 (Serial Number 056)." All notices served, posted, or published, and all notations made in connection with any declaration, application, entry, proof, etc., filed or initiated on July 1, 1908, or thereafter, will of course refer to only the new serial number which was given the initial paper, as that will be the only number given it for identification. In all notices to be served, posted, or published, the KIND of application, entry, etc., must also appear. In all correspondence with the General Land Office, AFTER the serial numbers have been reported each month, it will be sufficient to identify the case by giving the serial number only. This MUST always be given.

18. Notations of all letters received from, or written to, the General Land Office or elsewhere, all papers filed or issued, and all actions

taken (except a contest record), which relate in any manner to an application, entry, selection, proof, etc., will be made in the Serial Number Register, under the number given to the application, proof, etc., to which it relates. This notation should always include the date, and be as brief as possible—merely sufficient to identify the letter, paper, or action.

19. All rejected applications, proofs, etc., *whether appealed or not*, and all yearly proofs in Desert Land Entries, Relinquishments, Applications for sale of Isolated Tracts, Right of Way Applications, and other papers hereinafter listed as to be reported monthly by classified schedules of serial numbers, will be sent up monthly, without a letter of transmittal.

ALPHABETICAL INDEX.

20. The alphabetical index will be a card index. A separate card must be made for each person and must contain the name and address and the number and kind of the application, entry, etc., as follows:

CRAWFORD, SAMUEL H.,
148 Pine St.,
The Dalles, Oregon.

05 Hd.

21. The same card should be used to note the number and kind of all applications, entries, etc., made by the same person, as follows:

CRAWFORD, SAMUEL H.,
148 Pine St.,
The Dalles, Oregon.

05 Hd.

0467 T. and S.

22. Cards will be made for all applicants, entrymen, purchasers, selectors, etc., whose papers were filed prior to July 1, 1908, WHEN their cases are given new serial numbers.

RECEIPTS.

23. Receivers of public moneys will use but the one form of Receipt Blank (4-131, new form) for all moneys collectible by them, and for all certificates of deposit on account of surveys, military bounty land warrants, certificates of location, etc., which, under any act of Congress, may be received as cash in payment for lands. When the warrants or certificates of location are not tendered as cash, you will issue receipt only for the fees paid in connection with the "locating" thereof. The various forms of Receipt Blanks heretofore in use, in the shape of separate blanks or embodied in the homestead application or other papers, will be discontinued.

24. Receivers of public moneys may accept only CASH or CURRENCY. United States Postal Money Orders, however, may be received and accounted for as cash when they are made payable to the order of receivers of public moneys by the post-office where they are issued, and drawn on the post-office where the receiver is located. Receivers must not accept, or issue receipts for, money tendered in any other form.

25. Receivers must issue receipts for the full amount of money tendered and retained AT THE TIME THE MONEY IS TENDERED.

26. Any amount received in excess of legal requirements, if determined before receipt issues, MUST BE IMMEDIATELY RETURNED with the receipt which issues for the amount retained. If determined after receipt issues and before it is APPLIED (earned) and deposited to the credit of the Treasurer of the United States, it should be returned in the manner hereinafter indicated for the return of moneys for which receipts have issued.

27. Receivers of public moneys must not have any money in their custody or control, BEYOND THE DAY OF ITS RECEIPT, for which receipts have not issued.

28. The issuance of a receipt by a receiver of public moneys does not mean that the application, entry, proof, etc., in connection with which it is issued, is allowed or approved, or will be allowed or approved. It merely means that he has received the money and that it is in his custody or control until it is applied or returned.

29. If, after a receipt has been issued, the application, entry, proof, etc., with which the money was tendered can not be allowed or approved, or the transcripts of records, plats, etc., can not be made, you

will notify the party to whom the receipt issued, and, with this notification, the money tendered must be returned in the following way:

By your official check as receiver of public moneys, with notation on the check showing the number of the receipt which you issued for the money which you return.

30. It is not necessary that the receipt issued by you be surrendered before you return the money nor after you return the money. Your possession of a receipt issued by you will not be accepted as evidence that you have returned the money. The following will be accepted, and relieve you of further accountability therefor:

Your official check as receiver of public moneys, with notation thereon of your receipt number.

31. If, after a receipt has issued, the application, entry, proof, etc., CAN be allowed or approved, no further receipt for the money paid in connection therewith will be issued; but notice of such allowance or approval will be given the person to whom the receipt issued. Such notations as "Application not yet allowed" or "Certificate not yet issued" are not necessary on the receipts nor the abstracts.^a

32. A press copy of each receipt issued must be made before the receipt is delivered.

33. All receipts must be press-copied in the books provided for that purpose until further advised. Leave as much blank space, at the top and left edge of the sheet, as possible.

34. Press copies of receipts must always be kept together, in consecutive, numerical order, by receipt numbers.

35. A record of each receipt issued must be made, in consecutive, numerical order, in the "Daily Record of Receipts" before the receipt is delivered.

36. Receipts must be issued in consecutive, numerical order. Each receiver must use the lowest numbered receipt furnished him, first.

37. Any receipt blank that is mutilated or spoiled in any manner should be marked plainly across its face "CANCELED" and be placed in proper numerical order with the press copies. The numbers of all CANCELED receipts must be noted in their proper consecutive order in the "Daily Record of Receipts," with a notation on the same line, "Canceled."

38. At the end of each month, when ready to transmit the monthly returns and accounts, cut out from the press-copy books copies of all receipts issued during the month and forward them with the "Schedule of Receipts Issued."

39. Receivers must account for the total amount of money received by them, as shown by the total of the receipts issued, in one of the following ways:

^a See page 60.

(a) By depositing it to the credit of the Treasurer of the United States.

(b) By returning it to the person to whom receipt issued.

(c) By having it deposited in the designated depositaries to their official credit as "receiver of public moneys;" or,

(d) By having it on hand in their offices.

40. Receipts must always show the serial number of the application, entry, etc., in connection with which they are issued.

41. There will, of course, be no serial number on receipts issued for moneys received for transcripts of records, plats, sales of Government property, etc.

42. All application, entry, proof, or other papers with which money is required to be tendered must bear a notation of the number of the receipt which issued for the money. This receipt-number notation should appear immediately below the serial number of the application, entry, proof, certificate, etc., as follows:

"U. S. Land Office-----No. 056,

Receipt No. 17856."

43. Receipts must also show a full description of the land involved, except such as are issued for contest fees, transcripts of records, plats, etc., and selection lists, mineral entries, etc., which require a metes-and-bounds or other lengthy description of the land. In such cases the serial number and the survey number, if there be any, is sufficient.

44. A separate receipt is not necessary for any "excess" payments required. The excess payment can be noted on the same receipt that issues for the normal payment, provided it is paid at the same time. If an excess payment or additional payment is made subsequently, a separate receipt will then issue.

RECORDS AND ACCOUNTS OF RECEIVERS OF PUBLIC MONEYS.

45. Regulations as to the depositing of moneys are not, under these instructions, changed in any manner.

46. All moneys should be deposited to your official credit as receiver of public moneys until they are "applied" (earned) or "returned."

47. All moneys, as soon as they are APPLIED, must be deposited to the credit of the Treasurer of the United States under such regulations as are in effect.

48. When any item is to be APPLIED (earned), carry it to the proper classified Abstract of Collections, and note the date it is APPLIED in the "Daily Record of Receipts" in the column provided therefor.

49. All deposits to the credit of the Treasurer of the United States should be immediately posted on the "Abstract of Treasury Deposits."

50. When any item which you have previously reported in your monthly "Abstract of Unearned Fees RECEIVED" is applied (earned), carry it to the proper Abstract of Collections. Note the date "applied" in your "Daily Record of Receipts," and place a check mark after the item on the Abstract (of Unearned Fees and Other Trust Funds RECEIVED) for the month in which you first reported it.

51. If it is an item which you received prior to July 1, 1908, *and for which you have not issued any old form of official receipt*, issue the new receipt therefor, under the date it is APPLIED (earned). Make full notation of this receipt in the "Daily Record of Receipts" in RED INK. Also make proper notation on your old record of "Unearned Fees and Unofficial Moneys RECEIVED." If it is an item received in connection with any application, entry, proof, etc., received at your office before July 1, 1908, such application, entry, proof, etc., will, of course, be given a new serial number, as hereinbefore explained.

52. When any item is to be returned, carry it to the "Abstract of Unearned Fees and Other Trust Funds, APPLIED or RETURNED." Note the date of its return in the "Daily Record of Receipts" in the column provided therefor.

53. If it is an item received prior to July 1, 1908, no receipt will issue therefor, if the ENTIRE amount is returned. If a portion is retained, issue receipt for such portion, and make full notation of the receipt issued in the "Daily Record of Receipts," in RED INK.

54. At the end of each month copy from the "Daily Record of Receipts" to the "Abstract of Unearned Fees and Other Trust Funds RECEIVED" all items (omitting those in red ink) received during the month which have *neither been applied nor returned during the month*, and all items which have been *both received and returned during the month*. Check them off in the column provided for that purpose as they are copied.

55. The monthly "Abstract of Unearned Fees and Other Trust Funds RECEIVED" will, therefore, show all moneys *received but not APPLIED* (earned) during the month for which the abstract is rendered.

56. The monthly "Abstract of Unearned Fees APPLIED or RETURNED" will show only such moneys as were received in any month *prior* to the month they are applied, and those returned which were *received during any prior month and during the month* for which the abstract is rendered.

57. All items entered in the "Daily Record of Receipts" which do not show a date APPLIED or RETURNED are "unearned fees and other trust funds" on hand.

58. You should not copy any items from the "Daily Record of Receipts" to the "Abstract of Unearned Fees and Other Trust Funds RECEIVED" until the end of each month.

59. Receivers will prepare and forward to the General Land Office as soon as possible after July 1, 1908, an itemized list (on new Form 4-103) of unearned fees and other trust funds in their custody or control at the close of business June 30, 1908.

60. Such lists will no longer be required at the end of each calendar year, but only when called for by the Commissioner of the General Land Office or other proper authority.

61. You should make this list in duplicate and place the duplicate copy in the binder containing the "Daily Record of Receipts."

62. Receivers will keep record of, and render, in duplicate, with the monthly accounts, separate abstracts for each of the following classes of collections:

Abstract of collections on:

(New Form)

4-105 a. HOMESTEAD Declaratory Statements.

HOMESTEAD Entries (Original).

HOMESTEAD Entries (Final).

HOMESTEAD Entries (Soldiers' Additional).

HOMESTEAD Entries (Original) under Reclamation act (32 Stats., 388).

HOMESTEAD Entries (Final) under Reclamation act (32 Stats., 388).

HOMESTEAD Entries, on ----- Indian Lands.

Reservoir Declaratory Statements.

Coal Declaratory Statements.

Military Bounty Land Warrant Locations.

Scrip -----

Locations -----

Mineral Applications.

Adverse Mineral Claims.

Railroad Selections.

State Selections.

4-105. Timber and Stone Entries.

Commuted Homesteads.

Excesses.

Desert Land Entries (Original).

Desert Land Entries (Final).

Mineral Entries.

Public Sales.

Private Sales.

Coal Land Entries.

Installment payments on ----- Indian Lands.

Sales of Town sites.

Sales of Town Lots.

Sales of Reclamation Town sites.

4-105 b. Reclamation Water-Right Charges (Submit in TRIPLICATE).

4-146. Fees for Reducing Testimony to Writing, Transcripts of Records, Plats, etc.

(New Form)

4-146 a. Collections and Expenditures for reducing Testimony to Writing in Contest Cases.

4-103. Abstract of Unearned Fees and other TRUST FUNDS, RECEIVED.

4-103 a. Abstract of Unearned Fees and other Trust Funds, APPLIED or RETURNED.

4-106. Abstract of Treasury Deposits (To be Submitted in TRIPLICATE from "Reclamation" States and Territories).

4-106 a. Abstract of Certificates of Deposits on account of Surveys, Military Bounty Land Warrants, Scrip, and Certificates of Location, Received as Cash.

4-157. Recapitulation of Collections.

4-104 a. Monthly Account Current.

4-104 a. Quarterly Account Current.

4-115 a. "Schedule of Receipts Issued" (to be prepared at the end of each month, covering, in numerical, consecutive order, only the date, numbers, and such "Remarks" as may be necessary).

63. If no collections are made during the month, under a class indicated, do not forward blanks marked "No business."

64. Returns will be made MONTHLY, and accounts will be submitted both MONTHLY and QUARTERLY.

65. The Weekly Report (Form 4-120) will be discontinued.

66. A monthly account for the last month of each quarter is not required.

67. The description of the land involved will no longer be required in the abstracts forwarded with the returns and accounts.

68. All monthly abstracts and quarterly recapitulations and Quarterly Accounts Current MUST be submitted in DUPLICATE.

69. MONTHLY accounts need not be submitted in duplicate.

70. A recapitulation for each month will be required.

71. MONTHLY recapitulations need not be submitted in duplicate.

72. QUARTERLY recapitulations MUST be submitted in duplicate.

73. The new forms of abstracts are arranged for copying on the ordinary size typewriting machines and the DUPLICATE copies required may be made by the use of carbon paper at the same time the original is made. Both the original and carbon copies must be clear and distinct. Mark the carbon copy "DUPLICATE." Do not mark the original copy "Original."

74. QUARTERLY ABSTRACTS WILL BE DISCONTINUED.

75. On the abstract for the last month of each quarter carry the totals for the two previous months of the quarter, as follows:

Total for month of July	-----	\$1,400.00
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Total for month of August	-----	None.
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Total for month of September	-----	2,780.00
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Total for the quarter	-----	4,180.00
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Carry this total for the quarter to the Quarterly Recapitulation and thence to the Quarterly Account Current.

76. Receivers' accounts must be transmitted FLAT, not folded, and arranged in the following order:

(a) Press copies of receipts (arranged in consecutive, numerical order, accompanied by the "Schedule of Receipts Issued").

(b) Abstracts of collections (in the order in which they appear on the recapitulation).

(c) Recapitulation.

(d) Abstract of Treasury deposits.

(e) Abstract of certificates of deposit on account of surveys, scrip, etc., received as cash.

(f) Account current.

77. Arrange the duplicate copies likewise.

78. Do not staple account blanks or press copies of receipts.

79. All application and entry papers and all abstracts and accounts, with the monthly returns, must be transmitted FLAT, not folded. It is not necessary to brief the duplicate copies of abstracts and accounts. The originals **MUST** be briefed.

80. Application or entry papers, with the monthly returns, must be transmitted FLAT, in a separate package or packages from the receiver's accounts. The schedule of serial numbers and the classified schedules of serial numbers must accompany the application or entry papers.

81. Arrange all application and entry papers submitted with your monthly returns numerically, without regard to the kind or class of application or entry.

82. All papers belonging to the same application, entry, proof, etc., **EXCEPT THE PRESS COPIES OF RECEIPTS**, sent with your monthly returns, must be fastened together with the stapling machine provided therefor. (Adjust guide on machine so that papers will be fastened not more than one-fourth inch from the top.) All papers must be fastened at the top, in the center. Do not use more than one staple.

83. Arrange the papers in each case according to their dates, with the latest dated, or issued, paper on the bottom. Arrange papers with the top and left edges even.

84. Application and entry papers need not hereafter be briefed. The date of filing may be noted in the upper **LEFT**-hand corner.

85. The serial and receipt numbers must always appear on the upper **RIGHT**-hand corner.

86. Registers will submit, in duplicate, with monthly returns (on Form 4-115, new):

1. A "schedule of serial numbers" (all numbers to be entered in consecutive numerical order), covering all classes of applications and entries.

2. Separate schedules of serial numbers, covering in numerical order the following classes of papers:

(a) Applications, entries, etc., made prior to July 1, 1908, which have been given the new serial numbers during the month.

(b) Rejected applications, proofs, etc. (all classes to be entered in numerical order on the same schedule).

(c) Applications to make second homestead entries.

(d) Applications to make second homestead entries under the Reclamation Act.

(e) Applications to make second desert-land entries.

(f) Desert-land yearly proofs.

(g) Applications for sale of isolated tracts.

(h) Relinquishments, including, in numerical order, all classes of applications, entries, etc., on the same schedule.

(i) Indian allotment applications.

(k) Right of way applications.

(l) Homestead entries—forest.

(m) Applications to amend entries.

(n) Applications for leaves of absence.

87. The following old forms of blanks and records will be discontinued on July 1, 1908. Returns and accounts, however, for the month and quarter ending June 30, 1908, will be made on these old forms:

4-023	Abstract of land sold under the cash system.
025	declaratory statements.
026	locations, act of March 3, 1855.
027	locations, act of March 22, 1852.
028	locations, act of September 28, 1850.
029	locations, act of February 11, 1847.
030	locations, agricultural college scrip.
031	entries under homestead laws.
032	final certificates, homestead laws.
034	entries under desert-land laws.
036	applications under mining laws.
037	entries, mining laws.
038	adverse claims, mining laws.
040	final certificates, desert land.
041	locations, scrip, act of June 22, 1860.
043	monthly return of locations, Sioux half-breed.
044	monthly return of locations, Chippewa half-breed.
048	locations with scrip, act of June 2, 1858.
056	Indian allotments, act of February 7, 1887.
710	Record of Commissioner's letters received.
738	cancellations.
747	applications to make proof.
767	patents delivered.
796	abstracts of certificates of location, act of June 22, 1860.
942	Register of abstract of land sold.
943	abstract of declaratory statements.
947	abstract of locations, act of March 3, 1855.
948	abstract of locations, agricultural college scrip.
953	Record of quarterly accounts.
954b	quarterly contest account.

- 955 Record of fee statements.
- 956 monthly accounts.
- 958 Register of homestead entries.
 - 961 final homestead certificates.
 - 962 timber culture entries.
 - 963 timber culture receipts.
 - 965 final certificates, desert lands.
 - 966 abstract of desert land entries.
 - 967 entries, settler's relief.
 - 968 adverse mineral entries.
 - 969 mineral entries.
 - 970 mineral applications.
 - 972 timber culture certificates.
 - 975a Indian allotment applications.
- 977 Record of daily cash receipts and balances.
- 984 Register of receipts for annual payments.----under reclamation act (32 Stats., 388).
 - 986 monthly detailed statement of unearned fees and unofficial moneys.
 - 987 quarterly disbursing account of unearned fees and unofficial moneys.
 - 998 testimony, etc., fees.
- 4-541 Detailed statement of unearned fees, monthly.
 - 541a Detailed statement of unearned fees, on hand.
- 4-103 Abstract, quarterly, of unearned fees and unofficial money, received.
 - 103a quarterly, unearned fees and unofficial money, disbursed.
 - 103b Account, quarterly, contest.
 - 104a Account current, consolidated quarterly as receiver of public moneys.
 - 105 Account current, monthly.
 - 106 Abstract, quarterly, collections.
 - 106a Abstract of deposits, scrip, and warrants.
 - 119 Fee statement, monthly.
 - 120 Weekly report.
 - 146 Detailed account of fees received for reducing testimony to writing, etc.
 - 157 Recapitulation.
- 4-123 RECEIPT, soldier's declaratory statement.
 - 131 for moneys, cash system.
 - 134 for money, military bounty land warrant.
 - 136 for money paid for excess of area, agricultural college scrip.
 - 138 (duplicate) for fees under the homestead laws.
 - 139 for money paid for excess of area, homestead laws.
 - 140 (final) homestead.
 - 140a (installment) homestead.
 - 142a public timber sale, act of March 3, 1891, or June 4, 1897.
 - 143 receiver's final, desert land laws.
 - 145 mining laws.
 - 145a coal land.
 - 148 (final) timber culture.
 - 151 for location fees, military bounty land warrant.
 - 154b receipt for money, cash system, act of March 3, 1877, and December 16, 1878—Hot Springs, Ark.

- 186 RECEIPT, water-right application, Reclamation Act.
- 536 for moneys, declaratory statement.
- 601 reservoir declaratory statement receipt.
- 653 mineral application.
- 654 mineral adverse claim.
- 4-399 Letters for transmission of annual proof on desert-land entry.

88. These old forms and records are replaced by the Serial Number Register (4-051), the new form of Receipt (4-131), and the new forms indicated under paragraphs 62 and 86 herein.

89. Receivers will make record copies of their recapitulations and monthly and quarterly accounts, and place them in the binder containing the classified abstracts of collections.

Approved, June 10, 1908:

FRED DENNETT,
Commissioner.

NOTICE OF ALLOWANCE OR APPROVAL OF APPLICATIONS, ENTRIES,
PROOFS, ETC.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 7, 1908.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Referring to paragraph 31, circular of June 10, 1908 (37 L. D., 52), as follows:

If, after a receipt has issued, the application, entry, proof, etc., can be allowed or approved, no further receipt for the money paid in connection therewith will be issued; but notice of such allowance or approval will be given the person to whom the receipt issued. Such notations as "Application not yet allowed" or "Certificate not yet issued" are not necessary on the receipts nor the abstracts.

The "notice" in the case of an *original* application or entry will be a short form-letter, a supply of which will be forwarded to you in the near future. Until same are received, a short form of notice will be prepared by you and furnished to applicants.

The "notice" in the case of a *final* entry will be a duplicate of the register's certificate, which will be prepared and promptly delivered to entrymen at the same time the original is issued. The duplicate copy must be plainly marked across its face "Duplicate."

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
Acting Secretary.

CHIPPEWA AGRICULTURAL LANDS—ACTS JANUARY 14, 1889, JUNE 27, 1902, MAY 23, 1908.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 23, 1908.

REGISTERS AND RECEIVERS,

Cass Lake, and Duluth, Minnesota.

GENTLEMEN: 1. I inclose herewith a schedule containing 46,226.31 acres of lands within the former Chippewa of the Mississippi, Winnibigoshish, Leech Lake, Cass Lake, Fond du Lac, and Red Lake Indian reservations, being Chippewa lands ceded under the act of January 14, 1889 (25 Stat., 642). The schedule includes 3,341.72 acres in the former Leech Lake reservation, classified as "agricultural" under said act of January 14, 1889; 13,924.87 acres of "agricultural" lands selected and reserved for further selection by the Forester, Department of Agriculture, under the act of June 27, 1902 (32 Stat., 400), but opened to settlement and entry by virtue of section 4 of the act of May 23, 1908 (Public—No. 137); and 28,959.72 acres of "cut over" lands, or lands from which the timber has all been cut and removed, which lands are opened to homestead entry and settlement under said acts of June 27, 1902, and of May 23, 1908.

2. Section 4 of said act of May 23, 1908, declares that the lands in the Winnibigoshish, Cass Lake, Chippewa of the Mississippi, or Leech Lake Indian reservations, not included in the national forest created thereby, are open to homestead settlement, and that as fast as the timber is removed from timber land on any of said reservations, not included in the national forest, it shall be open to homestead settlement.

The schedule includes lands in the Fond du Lac and Red Lake reservations. As to these lands the instructions heretofore given by the Department apply, and they are not subject to settlement prior to the hour they are formally opened to entry. All persons who go upon any of the lands in said Fond du Lac and Red Lake reservations from which the timber has been cut and removed under said act of June 27, 1902, with a view to settlement thereon, prior to the hour the lands are formally opened to settlement and entry, will be considered and dealt with as trespassers, and preference will be given the prior legal applicant, notwithstanding such unlawful settlement.

3. The lands are to be disposed of to actual settlers only, under the provisions of the homestead law, as provided in section 6 of said act of January 14, 1889, a copy of which is hereto attached, and under the laws applicable to town sites, as provided by act of February 9, 1903 (32 Stat., 820).

4. The hour of 9 A. M., September 15, 1908, has been fixed upon as the time on and after which these lands will be opened to entry.

5. Notices for publication, as required by statute, have been forwarded to the newspapers in which they are to be published. You will post a copy of said notice in your office.

6. Applicants for these lands must possess the necessary qualifications required in the case of ordinary homestead entries.

7. Each settler is required, by the act of January 14, 1889, to pay for the lands settled upon the sum of \$1.25 for each acre, such payment to be made in five equal annual installments. The five annual payments must be paid at the end of the first, second, third, fourth, and fifth years, respectively, from the date of the homestead entry.

8. The usual fee and commissions must be paid at the time of original entry and when the commutation or final payment and proof are made, but you will not collect any payment for lands in excess of 160 acres embraced in one entry when the original entry is allowed, as the payment for such excess area will be included in the whole amount required to be paid in installments. See instructions of August 17, 1901 (31 L. D., 72), and September 6, 1901 (31 L. D., 106).

9. Under section 8 of the act of May 20, 1908 (Public—No. 125), entrymen for lands in the former Red Lake reservation will be required to pay a drainage charge of three cents per acre. In all entries made for the lands you will note on the application and receipt the following: "Subject to act of May 20, 1908."

10. A person who has heretofore made a homestead entry may make a second entry for 160 acres of these lands, where the same is authorized by the laws and regulations applicable to the public lands of the United States. See the acts of February 8, 1908 (Public—No. 18), June 5, 1900 (31 Stat., 267), and May 22, 1902 (32 Stat., 203), and the circular of instructions of February 29, 1908 (36 L. D., 291).

Additional homestead entries for so much land as, added to the quantity previously entered, shall not exceed 160 acres, are provided for in the acts of March 2, 1889 (25 Stat., 854), and April 28, 1904 (33 Stat., 527). See the circular of instructions of July 27, 1907 (36 L. D., 46).

In the consideration of applications to make second and additional homestead entries for these lands you will be governed by said instructions.

11. By act of February 9, 1903 (32 Stat., 820), chapter 8, title 32, of the Revised Statutes of the United States, entitled, "Reservation and sale of town sites on public lands," was extended to and declared to be applicable to ceded Indian lands within the State of Minnesota. The general town-site circular of June 12, 1903 (32 L. D., 156), will apply to applications made under said act.

12. The right of way of the Northern Pacific Railway Company extends across the Fond du Lac reservation in T. 48 N., Rs. 17, 18, and 19 W., and the disposal of the following tracts is subject to said right of way, viz: SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 5, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 6, T. 48 N., R. 17 W. N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 2, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, T. 48 N., R. 18 W. Therefore, in allowing entries for any of said tracts you will note on the original entry papers that it is subject to the right of way of the Northern Pacific Railway Company, and you will also make a similar note on the final entry papers when the same are issued.

13. The disposal of the following lands is subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, as provided in the act of June 7, 1897 (30 Stat., 67), viz: W. $\frac{1}{2}$ lot 9, lot 10, Sec. 4, T. 141 N., R. 27 W.; all of the lands in the schedule described as being in Ts. 142 and 143 N., Rs. 27, 28, and 29 W.; lot 9, Sec. 31, T. 148 N., R. 28 W.; lot 1, Sec. 4, lot 7, E. $\frac{1}{2}$ lot 8, Sec. 6; lots 5, 6, Sec. 8, T. 141 N., R. 29 W.; all the lands in Secs. 2 and 3, T. 141 N., R. 30 W., described in the schedule except lot 7, Sec. 3; all the lands in the schedule described as being in Secs. 27, 28 (except W. $\frac{1}{2}$ SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$), NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 34, all in T. 142 N., R. 30 W.; lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3; Secs. 4, 5, 6, 7, so far as described in the schedule; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, lot 1, Sec. 10; all of Secs. 16, 17, 18, described in the schedule, all in T. 146 N., R. 30 W.; lots 1, 2, 3, Sec. 19; lots 3, 8, Sec. 31; lots 2, 3, Sec. 32; lots 2, 3, 4, Sec. 33, T. 147 N., R. 30; lots 2, 4, 5, 6, 7, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, T. 141 N., R. 31 W.; S. $\frac{1}{2}$ lot 2, lot 3, Sec. 25; lot 1, Sec. 36, T. 142 N., R. 31 W.; all of Secs. 2, 3, and 4, described in the schedule; lot 2, Sec. 7; lot 1, Sec. 9; lot 3, Sec. 33; all in T. 143 N., R. 31 W.; lot 2, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 15; lots 1, 3, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 16; so much of Secs. 21, 22, 23, 26, 27, 28, 32, 33, 34, 35, as is described in the schedule, all in T. 144 N., R. 31 W.; SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 28, T. 145 N., R. 31 W.; lot 1, Sec. 1; lot 4, Sec. 7; lot 1, Sec. 12; lots 6, 7, Sec. 13; lots 2, 4, Sec. 18; lot 2, Sec. 22; E. $\frac{1}{2}$ lot 3, Sec. 23, T. 146 N., R. 31 W.; lot 5, Sec. 13; lot 6, Sec. 15; lot 7, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19; lot 9, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 20; lot 7, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21; NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 22; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 23; lots 1, 2, 3, 4, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 24; all of Secs. 25 to 34, inclusive, described in the schedule, all in T. 147 N., R. 31 W.; lot 1, Sec. 25, T. 146 N., R. 32 W.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

FRANK PIERCE,

First Assistant Secretary.

(Sec. 6, Act of January 14, 1889, 25 Stat., 642.)

AN ACT for the relief and civilization of the Chippewa Indians in the State of Minnesota.

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and at the expiration of thirty days the said agricultural lands so surveyed shall be disposed of by the United States, to actual settlers only, under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting valid preemption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and, if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or preemption law, and who has failed, from any cause, to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act.

(Act of June 27, 1902, 32 Stat., 400.)

AN ACT to amend an act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine.

* * * * *

After the merchantable pine timber on any tract, subdivision, or lot shall have been removed, such tract, subdivision, or lot shall, except on the forestry lands aforesaid, for the purposes of this act, be classed and treated as agricultural lands, and shall be opened to homestead entry in accordance with the provisions of this act.

(Sec. 4, Act of May 23, 1908, Public—No. 137.)

AN ACT amending the act of January fourteenth, eighteen hundred and eighty-nine, and acts amendatory thereof, and for other purposes.

SEC. 4. That all land in any of said reservations, the Winnibigoshish Indian reservation, Cass Lake Indian reservation, Chippewas of the Mississippi reservation, or Leech Lake Indian reservation not included in the National Forest hereby created as above described, heretofore classified or designated as agricultural lands, is hereby declared to be open to homestead settlement; and any of said land which has been classified as timber land shall be open to homestead settlement as soon and as fast as the timber is removed therefrom, in conformity with the homestead law, except that none of said lands shall be disposed of except on payment of one dollar and twenty-five cents per acre.

[Schedule omitted.]

APPLICATION—CONFLICT WITH RAILROAD SELECTION—OFFERED
LAND—PRIVATE ENTRY.SCOFIELD *v.* OTTERSON.

Where at the time of tendering his application to enter or locate land covered by an unapproved railroad indemnity selection the applicant questions the validity of such selection, and procures its cancellation, he does not thereby acquire a preference right of entry, but is only entitled to have his application determined on its merits, and in event it is properly rejected he can not set up a new and independent right or claim to the prejudice of intervening adverse rights.

Land once offered and subsequently segregated from the public domain by entry, selection, withdrawal, etc., *prior to the passage* of the act of March 2, 1889, thereby lost its status as offered land, and until reoffered is not subject to private entry; but the character of offered land at the date of the passage of the act of March 2, 1889, and *thereafter* segregated, is not altered nor on that account taken out of the class of land subject to private entry or military bounty land warrant location.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 23, 1908.* (E. O. P.)

June 29, 1907, the Department entertained motion for review in the above-entitled case of its unreported decision of May 14, 1907, affirming the action of your office and of the local officers rejecting the application of Edward J. Scofield to locate military bounty land warrant, No. 29,660, on the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 29, T. 128 N., R. 41 W., St. Cloud land district, Minnesota. The order entertaining said motion having been complied with, the record is now before the Department for final consideration.

The rejection of Scofield's application rested upon a finding that one Tam Otterson was, at the date said application was presented, maintaining such a settlement on the land as entitled him to exercise a preferred right of entry therefor under the homestead law.

The record discloses the commission of error on the part of the officers of the land department, due in the first instance to a mistake as to the status of the land. June 19, 1896, Otterson tendered his homestead application for the tracts described and alleged, in support thereof, that his cultivation and improvement of the land were worth \$100. His application was rejected by the local officers, on the ground that the land was within the twenty-mile indemnity limits of the St. Paul & Pacific, St. Vincent extension, and had been located for the benefit of the company October 28, 1873. On appeal your office affirmed this action and found that the land had been patented to the railway company April 23, 1883. This decision was affirmed by the Department August 28, 1900, and the case finally closed June 10, 1901. Not until after the filing of Scofield's application, now

under consideration, January 19, 1905, was the attention of your office called to the fact that the land had not been patented to the railway company. This error was set up by Scofield in his appeal from the rejection of his application by the local officers. Thereupon, the Department, in accordance with the recommendation of your office, vacated the prior decisions rejecting Otterson's homestead application and remanded the case "for further consideration and decision upon a correct statement of the facts bearing upon the tracts involved." June 12, 1905, the railway company's selection was held for cancellation and, no appeal being taken, this action became final October 2, 1905, and the only matter remaining for determination was with respect to the conflicting claims of Otterson and Scofield. Your office directed the local officers to order a hearing to determine whether or not "Otterson has continued to reside upon and improve this land as a homestead settler," and instructed that in such event he "would appear to have a better right by reason of his homestead application." From the testimony adduced at such hearing the local officers made the following finding of fact, which in the opinion of the Department is warranted:

It appears that Otterson commenced improving the land in 1897 and has cultivated portions of it ever since, having now about thirty-five acres under cultivation. The testimony fails to show that Otterson had resided upon the land except to stay over night at infrequent intervals until February, 1905. His father owns and resides upon an adjoining tract, and he appears to have made his home with his father.

Otterson did not establish actual residence on the land until February, 1905, subsequent to the tender of Scofield's application.

It is at once apparent that the right of Scofield is not supported by any superior or controlling equity. Otterson's claim was at the time Scofield sought to make his location evidenced by such acts of possession as to put Scofield on notice. It is insisted, however, that Scofield, having been the first to call the attention of the land department to the defect in the claim of the railway company, thereby gained a preferred right to enter the land. If by this counsel means to contend that Scofield acquired the same right that is recognized in a successful contestant under the homestead law, his position is untenable. The only right acquired by one who, at the time of making application to enter or locate land covered by an unapproved railroad indemnity selection, questions the validity of such selection and procures its cancellation, is to have the particular claim he is asserting determined on its merits. But he gains no right to make entry or location within thirty days from the cancellation of the railroad selection, and, in the event the application presented at the time he attacked the unapproved selection is properly rejected, he cannot set up any other right as against adverse claimants. It follows

therefore that, if Scofield's right under his attempted military bounty land warrant location fails, the right of Otterson, based upon the residence established by him in February, 1905, would prevail even though the Department were to hold that his alleged settlement prior thereto was insufficient to defeat the location of Scofield. Counsel for Otterson set up in opposition to the present motion the claim that the land in question is not subject to military bounty land warrant location and directs the attention of the Department to the fact that the land was never reoffered for sale after the revocation of the withdrawal made on account of the railroad grant. Inquiry at your office establishes the truth of this allegation. The land was offered in 1864 and was thereafter withdrawn, in 1869 and 1872, on account of the grant to the St. Paul and Sioux City Railway Company, and this withdrawal was not revoked until May 22, 1890 (12 L. D., 541). The order revoking said withdrawal provided that the lands included therein—

be restored to the public domain and opened to settlement and entry in accordance with the rules heretofore established in similar cases.

The rules referred to are those established by departmental circular of September 6, 1887 (6 L. D., 131), the last paragraph of which expressly provides that "Private cash entries of the lands restored will not be allowed." The land having been restored to entry in 1890, subsequent to the passage of the act of March 2, 1889 (25 Stat., 854), and being at that time "unoffered," it could never have thereafter become subject to military bounty land warrant location (Julius A. Barnes, 6 L. D., 522). Land once offered and later segregated from the public domain by entry, selection, withdrawal, etc., *prior to the passage* of the act of March 2, 1889, *supra*, lost its status as offered land, and until reoffered was not subject to private entry, though the character of offered land at the date of the passage of the act of March 2, 1889, *supra*, and *thereafter* segregated, is not altered nor on that account taken out of the class of land subject to private entry, or military bounty land warrant location. The rule announced in the cases of Victor H. Provensal (30 L. D., 616), J. L. Bradford (31 L. D., 132), and Charles P. Maginnis (31 L. D., 222), does not go further (Lawrence W. Simpson, 35 L. D., 399, 403). The land in question would not have been subject to military bounty land warrant location under any departmental ruling made prior to the decision in the Simpson case, *supra*, or if that decision had never been written. Neither can the attempted location by Scofield be accepted under the decision rendered in the case of Roy McDonald *et al.* (36 L. D., 205), or section 12 of the act of May 29, 1908 (Public—160). The location of Scofield of the tracts in question cannot therefore be allowed.

As the testimony shows that Otterson has established residence on the land and as it is clear the claim he originally sought to initiate by entry has never in fact been actually abandoned, the Department, after the most careful consideration of the pending motion, is of opinion the previous action taken by it should be adhered to and Otterson be allowed to perfect his homestead entry.

The motion for review is accordingly hereby dismissed.

STATE SELECTION—RAILROAD SELECTION—SETTLEMENT RIGHTS.

NORTHERN PACIFIC RY. CO. ET AL. *v.* STATE OF IDAHO.

The act of February 26, 1895, does not authorize classification of lands in even-numbered sections, and the fact that lands in an even section were classified as mineral under that act is no bar to selection thereof by the railway company, where such lands were returned as nonmineral at the time of survey.

The right of a State to apply for a survey under the act of August 18, 1894, with a view to obtaining a preferred right of selection, is not limited to an area sufficient to satisfy its grant.

The right of a State by virtue of an application for survey under the act of August 18, 1894, is superior to that of a homestead applicant who made settlement subsequent to the filing of the State's application for survey.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, July 24, 1908. (F. W. C.) (E. O. P.)

The State of Idaho, Northern Pacific Railway Company, and numerous homestead claimants, have each appealed to the Department from your office decision of March 16, 1907, wherein the State's selection of lands for agricultural college purposes under the act of July 3, 1890 (26 Stat., 215), described in its list No. 2, was rejected for conflict with the railway company's selection, per list No. 61, of the same lands under the act of March 2, 1899 (30 Stat., 993), and the company's selection, per lists Nos. 133 and 135, under the same act, is held for cancellation for conflict with the State's selection of the tracts therein described, under section 8 of the act of July 3, 1890, *supra*, for university purposes. The applications of numerous homestead claimants were also rejected on account of the selections made by the State and the railway company.

The lands included in the company's list No. 61 are described as sections 14 and 22, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, T. 44 N., R. 2 E. Said list was filed June 21, 1901, before survey and prior to the application of the State for survey thereof. The right of the company is therefore superior to that of the State unless the lands are not subject to selection under the act of

March 2, 1899, *supra*. As classification of the even-numbered sections within the territory specified in the act of February 26, 1895 (28 Stat., 683), was not authorized thereunder, and as the returns made at the time of actual government survey show the tracts to be non-mineral, the objection to the company's selection based upon the mineral classification of the lands is not well founded.

The company's lists Nos. 133 and 135 were filed May 5, 1904, and May 27, 1904, respectively, long after the receipt of the application of the State for survey of the tracts described therein. It is insisted by the railway company that the State, by virtue of its said application, gained no preferred right of selection under the act of August 18, 1894 (28 Stat., 372, 394), for the reason that the area embraced in this and other similar applications greatly exceeded the unsatisfied portion of the State's grant.

In the opinion of the Department, the State's right to apply for a survey with a view to obtaining a preferred right to select land on account of its grants is not limited to an area sufficient to satisfy them. An attempt to comply with such a limitation and at the same time expect to secure the exact amount of land due under the grants would be futile. In advance of survey it can not be determined what portion of the lands described in the application are of the character subject to selection. Neither is it practicable to ascertain in advance what portion of the land is subject to a prior and superior claim, and from the area embraced in the application for survey the State may be able to obtain only a small part. The question as to the extent of the area for which the State may make application for survey is one solely between the Government and the State and the determination thereof rests with the land department. (Thorpe *et al. v. State of Idaho*, on review, 36 L. D., 479.)

The action of your office with respect to the selection by the railway company of the tracts described in its lists Nos. 133 and 135 is correct.

It has also been settled by repeated decisions of the Department that the claim of the State is superior to that of a homestead applicant whose settlement on the land is subsequent to the filing of the State's application for survey. The same rule applies in determining the superiority of claim between the railway company and the homestead applicant and the disposition made by your office of the different homestead applications is in accord with the recent departmental decisions governing the matter. (Thorpe *et al. v. State of Idaho*, 35 L. D., 640; Williams *v. Same*, 36 L. D., 20.)

Your attention is directed to the relinquishments filed by the State of its claim to the tracts selected by it in conflict with the homestead claims of John J. Morrison, Elisha Lines, and William H. Hartman.

Hartman has also filed a relinquishment of his claim to the same tract as that covered by the State's waiver.

The Department after full consideration of the matters urged in the several appeals, finds no sufficient reason for disturbing the decision of your office and the same is hereby affirmed.

NORTHERN PACIFIC GRANT—SELECTION UNDER ACT OF MARCH 2,
1899—APPLICATION FOR SURVEY BY STATE.

STATE OF IDAHO *v.* NORTHERN PACIFIC RY. CO. ET AL.

Section 4 of the act of March 2, 1899, recognizes the right of the Northern Pacific Railway Company to take unsurveyed lands in making selection under the provisions of that act.

An application by a State for the survey of lands, with a view to selection thereof, does not operate as an absolute withdrawal of the lands, but merely subjects them to the preferred right of the State to make selection thereof within sixty days from the date of the filing of the approved plat of survey.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 24, 1908.* (E. O. P.)

Appeals from your office decision of May 1, 1907, wherein you hold for cancellation the selection of the Northern Pacific Railway Company, per list No. 62, of Secs. 29 and 31, and W. $\frac{1}{2}$, Sec. 33, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho, made under the act of July 1, 1898 (30 Stat., 597, 620), and award the superior right to select said tracts to the State of Idaho, have been filed on behalf of the railway company and numerous homestead claimants whose applications to enter were at the same time rejected. Said decision also involved a settlement of the respective rights of the railway company and two homestead claimants to the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ (lots 3 and 4) and N. $\frac{1}{2}$ NE. $\frac{1}{4}$ (lots 1 and 2), Sec. 6, same township and range, selected by the company, per lists No. 61 and 76, respectively, under the act of March 2, 1899 (30 Stat., 993). As to these conflicting claims the decision was modified by your subsequent decision of May 24, 1907, and the homestead application of Arnold Hooper for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said Sec. 6 was rejected and the similar application of William Perkins for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ of said Sec. 6 was allowed to stand pending the outcome of a hearing to be had later in the event he renewed his application for these tracts. His application as originally presented embraced in addition to the tract described, the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, T. 44 N., R. 3 E., the superior right to which was by your earlier decision held to be in the State. Hooper and Perkins have filed a joint appeal from your action in thus modifying your former decision.

A separate appeal has also been filed by John C. Dwyer, homestead applicant for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29, same township and range, upon which he alleged that he made settlement September 14, 1901.

The State made selection of the land described in the railway company's list No. 62, on account of the grant made to it by the act of July 3, 1890 (26 Stat., 215), of lands for penitentiary purposes. Its list, No. 2, was filed in the local office July 18, 1905. The land in question is a portion of that for the survey of which the State filed its application July 8, 1901, under the provisions of the act of August 18, 1894 (29 Stat., 372, 394), and the contention of the several appellants that no preferred right of selection accrued to the State by virtue thereof has already been decided by the Department favorably to the claim of the State (*Thorpe et al. v. State of Idaho*, 35 L. D., 640), and as none of the matters urged in opposition thereto appear to warrant any modification or reversal thereof, this question will not now be re-opened or further considered.

However, the railway company's selection was first made June 21, 1901, prior to the filing of the application of the State for survey, and if the land described is subject to selection by the company under the act of July 1, 1898, *supra*, its claim is superior to that of the State. But the land in conflict lies within the indemnity limits of the company's grant under the act of July 2, 1864 (13 Stat., 365), and was classified as mineral by the Board of Land Commissioners appointed under the act of February 26, 1895 (28 Stat., 683), which classification received departmental approval March 26, 1901. The land was not, therefore, subject to selection by the company under the act of July 1, 1898, *supra*, and its said list No. 62 was properly held for cancellation by your office (*Northern Pacific Ry. Co. v. Frei*, 34 L. D., 661). The cancellation of said list No. 62 leaves for determination only the question as to the superior right to the land in said sections 29 and 31 and W. $\frac{1}{2}$, Sec. 33, as between the State and the homestead applicants. None of the homestead claimants except David Cheney, John Stevenson and William J. Theriault allege settlement prior to July 8, 1901, the date the preferred right of the State attached. As to the homestead applicants whose settlements were made after that time, their applications were properly rejected where in conflict with the State's selection. (*Thorpe et al. v. State of Idaho, supra.*) Since the present appeal was taken, the State has waived its claim to the tracts in conflict between it and the said Cheney and Theriault and their applications for said tracts may now, in the absence of other objection, be allowed. Stevenson at the time he made settlement, had not declared his intention to become a citizen of the United States and this declaration was not filed until after the

right of the State had intervened. He therefore took nothing by his settlement, as one disqualified to make homestead entry is disqualified to make a valid settlement. (*Short v. Bowman*, 35 L. D., 70, 74.) His application was therefore properly rejected. This disposition of the conflicts between the State on the one hand, and the railway company and homestead claimants on the other, leaves for consideration only the conflicts between the company and the settlers, and these conflicts concern lands other than those described in the State's list No. 2 and the railway company's list No. 62, viz., Secs. 29 and 31, and the W. $\frac{1}{2}$, Sec. 33, T. 44 N., R. 3 E.

The company filed its list No. 61 June 21, 1901, and list No. 76 October 1, 1901. Both of said lists were held for cancellation by your first decision of May 1, 1907, in so far as they were in conflict with the homestead application of Arnold Hooper, covering the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ (lots 3 and 4), Sec. 6, T. 43 N., R. 3 E., included in said list No. 61, and William Perkins, covering the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ (lots 1 and 2) of said Sec. 6, included in said list No. 76, because of the failure of the company to file second lists conforming the original selections made before survey to the lines of approved plat. (*Northern Pacific Ry. Co. v. Pyle*, 31 L. D., 396, 398.) It was later discovered, however, that such new lists had been seasonably filed, and by a later decision of May 24, 1907, you modified your former action and rejected the application of Hooper and afforded Perkins opportunity to prove his allegation of settlement on the land in controversy prior to the filing of the company's list No. 76. It is from this action the joint appeal of Hooper and Perkins was taken. It is clear, even though the settlement of Hooper at the time alleged, viz., July 1, 1901, be conceded, that his rights are subject to those initiated by the company by the filing of its said list No. 61, June 21, 1901. It is contended, however, that the company was not entitled to select, under the act of March 2, 1899, *supra*, unsurveyed lands, lands classified as mineral at the date of selection under the act of February 26, 1895, *supra*, or lands for the survey of which application was made by the State.

The right of the company to select unsurveyed lands is recognized by the language of the fourth section of the act defining the manner in which such lands are to be described and providing for the filing of a new list after survey. The acts of June 6, 1900 (31 Stat., 614), and March 3, 1901 (31 Stat., 1037), relate only to the act of June 4, 1897 (30 Stat., 36), and in no manner repeal or modify the provisions of this act of March 2, 1899, *supra*, permitting selection by the company of unsurveyed lands. (*Comstock v. Northern Pacific Ry. Co.*, 34 L. D., 88.)

These tracts being parts of an even-numbered section were not subject to classification under the act of February 28, 1895, *supra*

(Northern Pacific Ry. Co. v. Mann, 33 L. D., 621, 622), and as they were returned as non-mineral at the time of survey, they are properly subject to selection under the act of March 2, 1899, *supra*.

The objection that the lands were not subject to selection by the company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper, as the company's selection was made June 21, 1901, and the State's application was not presented until July 8, following. As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State to select them within sixty days from the time of the filing of the approved plats of survey.

The objection made by counsel in argument that the non-mineral affidavit filed with the company's lists is insufficient, appears to be based upon the requirements contained in departmental circular of July 7, 1902 (31 L. D., 372, 375). This circular defines the procedure which must be followed in making lieu selections under the acts of June 4, 1897 (30 Stat., 36), and June 6, 1900 (31 Stat., 614), and has no application to the act of March 2, 1899 (30 Stat., 993). The surveyor's return of the selected tracts as non-mineral is *prima facie* evidence of the character thereof, and in the absence of any protest against the selection upon the ground that the land is known to be mineral at the time of selection, this question is not an issue. (Davenport v. Northern Pacific Ry. Co., 32 L. D., 28.)

The proposition advanced by counsel that the settlement of Perkins as alleged should be accepted as established, is not supported either by law or reason. His right depends upon prior settlement as a fact and not upon the mere allegation thereof, and where there is an adverse claim asserted justice demands that the party claiming a right should, if that right is questioned, be required to establish the things necessary to sustain it. In a letter recently received by the Department, the statement is made that the said Perkins has died since the present appeal was taken, leaving surviving him his widow, Henrietta A. Perkins. As the widow of a deceased homestead claimant succeeds to all his rights, she will, upon proof of the death of her husband, be allowed to proceed to the perfection of such rights as he had, to the extent and in the manner herein defined and indicated.

The Department, after careful examination of the record and consideration of all the matters set forth in support of the various contentions of the several appellants, is convinced of the correctness of the action of your office, and the decision appealed from is accordingly hereby affirmed.

APPLICATION FOR SURVEY—EFFECT OF—PREFERRED RIGHT OF STATE.

SWANSON *v.* NORTHERN PACIFIC RY. CO.

An application by a State for the survey of a township, with a view to the selection of lands therein, operates only to secure to the State a preferred right of selection, and does not reserve the lands from other disposition until the expiration of three months from the filing of the approved plat of survey, or prevent the acceptance of applications therefor subject to the superior right of the State.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 24, 1908.* (E. O. P.)

Oscar J. Swanson has appealed to the Department from that part of your office decision of November 15, 1907, which affirms the action of the local officers in rejecting his application presented October 5, 1906, to make homestead entry of the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 2, T. 43 N., R. 3 E., Coeur d'Alene land district, Idaho, because in conflict with the selection of the same tract by the Northern Pacific Railway Company, made October 1, 1901, while the land was unsurveyed, under the act of March 2, 1899 (30 Stat., 993). Swanson alleged in support of his application that he made settlement on the tract in controversy together with the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 11, same township and range, also embraced in his homestead application and which appears to be subject to no superior outstanding claims, June 7, 1904.

The several objections raised to the validity of the railway company's selection have already been considered by the Department and, in its decision this day rendered in the case of State of Idaho *et al. v.* Northern Pacific Ry. Co., decided adversely to the claim of appellant.

It is contended further that the application of the State of Idaho for a survey of the township of which the tracts applied for are a part, made prior to the selection by the railway company, operated to reserve the land from other disposition until after the expiration of three months from the filing of the approved plat of survey, and as his settlement was made and his homestead application presented prior to the expiration of said period, his entry should have been allowed. The effect of the application of the State was not, however, to place the land in reservation but only to secure to the State a preferred right to select the lands covered by its application. It did not operate to prevent the filing of other applications for the land subject to the superior right of the State. In this case the State made no attempt to exercise its preferred right of selection and there was therefore no bar to the consideration of other claims the same as though such right had never existed.

The decision appealed from is in accord with recent departmental decisions and is hereby affirmed.

CALDWELL *v.* HALVORSON.

Motion for review of departmental decision of May 4, 1908, 36 L. D., 395, denied by First Assistant Secretary Pierce, July 24, 1908.

DESERT LAND ENTRY—ANNUAL EXPENDITURE—CULTIVATION—
DISKING.

JAMES STIMSON.

An expenditure for "disking" land embraced in a desert land entry, with a view to planting the same to crop, may be accepted as equivalent to first plowing of the soil, where the land is of such character that disking is the best practical way of preparing it for crop and the method usually employed in that vicinity, and the entryman is entitled to credit therefor toward meeting the requirements of law with respect to annual expenditure.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, July 28, 1908.* (J. F. T.)

James Stimson has appealed to the Department from your decision of April 9, 1908, rejecting his third year's proof of expenditures upon his desert land entry number 8474, made November 17, 1904, for the NE. $\frac{1}{4}$, Sec. 12, T. 27, R. 9, Helena, Montana, land district, and holding his said entry for cancellation unless further showing is made within sixty days from notice.

The claimant's statement of expenditures is as follows:

Balance cr. from 1st and 2d proof combined.....	\$80.00
In disking 20 acres 3 times by one man and team for 10 days at \$7.50 (& horses).....	75.00
In enlarging main ditch, man & team for 4 days and plowing laterals by same for 6 days at \$5.00.....	50.00

Of these items of expenditure you say—

The first and last items are accepted but the "disking three times" is not allowed as the only cultivation allowed in annual proof is first plowing or breaking of the soil.

Upon this appeal claimant files a corroborated affidavit as to this item of expenditures, as follows:

That he is the identical person who made desert land entry number 8474, for the NE. $\frac{1}{4}$, Sec. 12, Tp. 27 N., R. 9 W., Mont. Mer. (unsurveyed), at the district land office at Helena, Montana, on the 17th day of November, 1904.

That for the third year's proof upon the said entry affiant reported the expenditure of the sum of seventy-five dollars (\$75.00) as a portion of the labor expended and required for such proof.

That the said sum was expended in disking 20 acres three times, with a man and four-horse team, requiring 10 days of such labor at an expense of \$7.50 per day and was for the purpose of preparing the land for sowing timothy seed, which was duly sown and is now coming up, being fixed in the ground.

That, on account of the boulders lying in and underneath the sod it is an impossibility to plow said land and if plowed it could never be brought into a state of cultivation for the reason that the prevailing high winds would blow the soil away and nothing but a rock pile would remain.

That this system of seeding and reclaiming such land has been generally adopted in the vicinity and is found to be the only practical method of obtaining any field crop and is always successful when followed with proper irrigation.

That such cultivation results in the permanent improvement of the land, by causing a growth of timothy hay to be produced on land otherwise suitable for limited grazing and is an expense to the entryman equal to that of a first plowing.

It thus appears that this "disking 20 acres 3 times" for which claimant asks credit as one item of annual expenditure, is the first breaking of this twenty-acre tract and is the full equivalent of a first plowing of the soil. No reason appears for a distinction between the two methods of cultivation.

The Department is of the opinion that upon the proof now on file this item of expenditure should be allowed.

Your decision is accordingly reversed.

CROW CREEK NATIONAL FOREST—LIEU SELECTIONS—ACT MARCH 13,
1908.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 23, 1908.

REGISTERS AND RECEIVERS,

United States Land Offices,

State of Wyoming.

GENTLEMEN: The act of Congress approved March 13, 1908 (Public—No. 53), entitled "An act authorizing the exchange of lands for the enlargement of maneuvering grounds," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the Secretary of War shall deem the acquisition of lands in private ownership necessary for the enlargement of the military maneuvering grounds for the United States Army and National Guard within the reservation known as the Crow Creek National Forest, he may certify to the Secretary of the Interior the description of such specific tract or tracts of land as he may deem necessary for such purpose, and the Secretary of the Interior may thereupon, with the approval of the President, exchange therefor an equal area of any of the unoccupied, non-mineral, untimbered public land subject to entry within the State of Wyoming.

Under the said act whenever the Secretary of War deems it necessary, for military purposes, to acquire title to any land in the Crow

Creek National Forest in private ownership to which patent or its equivalent has issued, he shall certify such fact to the Secretary of the Interior, giving a description of the land desired and if possible the names of the owners thereof. Upon the approval by the President this office will proceed with the exchange of such lands to which the parties claiming same can show a valid title free from all encumbrances. Upon the receipt of such authority this office will, when possible, advise the owners of the lands that upon compliance with the following regulations they will be permitted to exchange the same for other vacant, surveyed, unoccupied, non-mineral, non-saline, non-timbered public land subject to entry within the State of Wyoming.

The owner of the land within the said national forest, or his duly authorized agent or attorney-in-fact, must file in the land office of the district wherein the land desired is situated an application specifically describing the land desired and that offered as basis of the selection by section, township and range.

There should also be filed with the application an affidavit executed by the selector or any credible person having the requisite personal knowledge of the facts, showing the land selected to be vacant, surveyed, unoccupied, non-timbered, non-mineral, non-saline public land subject to entry.

Each application must be accompanied by a relinquishment duly executed and acknowledged, and upon notice recorded, in accordance with the laws of Wyoming, and an abstract duly authenticated by the proper officials, showing that at the time the relinquishment was filed in your office the full legal and equitable title was in the party making the relinquishment and that the land was free from liability for taxes, pending suits, judgment liens, or other encumbrances.

Selections should be filed in the proper land office within a reasonable time after the relinquishment or reconveyance has been executed in the manner indicated.

In all cases where the showing required in these instructions, both as to the title or claim to the land relinquished and as to the character and condition of the land selected, is not made by the selector at the time of filing the selection, you will reject the selection and give due notice thereof to the parties interested, in which notice the reasons for your action must be stated. Appeal from such action may be taken under the rules as in other cases. At the expiration of the time allowed for appeal, you will forward the record with your report thereon.

If protest or objection shall be at any time filed against the selection, you will forward the same to this office for consideration in connection with the selection.

Upon the receipt by this office of the papers a preliminary examination will be made and if the showing made is satisfactory the deed of

conveyance with the abstract will be returned for the purpose of having the deed recorded and the abstract brought down to show such recording. The extended abstract must be authenticated in the same manner as was the original abstract and new certificate as to taxes, judgment, etc., furnished. Publication must also be made in compliance with circular of February 21, 1908 (36 L. D., 278).

This action however is not to be construed as binding upon the government in its future disposition of the case, but is merely to protect as far as possible the selector from clouding his title to the land offered as basis, by recording his deed, until he has at least made a prima facie case.

Upon the return of the deed and abstract to this office the selection will be considered and if regular and correct in all respects will be passed to patent.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

RIGHT OF WAY—ACT OF MARCH 3, 1891, AND SEC. 2, ACT OF MAY 11, 1898.

INYO CONSOLIDATED WATER CO.

Applications for rights of way under the provisions of the act of March 3, 1891, and section 2 of the act of May 11, 1898, will not be allowed except upon a satisfactory showing that the right of way is desired for the primary purpose of irrigation.

The land department can not undertake to set forth in advance specifically the nature of the proof necessary to establish the right to any particular right of way applied for.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, July 30, 1908.* (E. O. P.)

The Inyo Consolidated Water Company has appealed to the Department from your office decision of August 28, 1907, rejecting its application for right of way for a flume and pipe line and sites for power stations, made under the provisions of the act of March 3, 1891 (26 Stat., 1095), and section two of the act of May 11, 1898 (30 Stat., 404), over lands in the Sierra National Forest.

The decision of your office is based upon the failure of the company to show that the principal use of the right of way was for the purpose of irrigation, and that the only privilege to which the company might be entitled is that conferred by the act of February 15, 1901 (31 Stat., 790).

Filed with the appeal here is a supplemental showing consisting of the statements of the engineer who surveyed the right of way, concerning the conditions existing in the immediate vicinity thereof in so far as they relate to the character of the soil and the need for irrigation. It may be conceded that the land is arid and unsuitable for cultivation without irrigation and that the only way in which water can be obtained for such use is as set forth in the supplemental showing, yet this falls far short of establishing that the *primary purpose* of this company is to supply this particular need. It does afford some support for the allegation that the "main and ultimate use of said water will be the irrigation of" the land referred to, but when consideration is given to the other facts disclosed by the record the force of the showing thus made is materially weakened if not practically destroyed.

The notices posted at the time of appropriating the water intended to be used, which under the law of the State must disclose the purpose for which it is claimed, each set forth that it is to be used "in generating electricity for heat, light and power, and for any and all other useful purposes."

The map filed with the application for right of way plainly shows that the company contemplates at all events to carry out the specific purpose thus disclosed. The map complies with the requirements of paragraph 50 of the regulations approved September 28, 1905 (34 L. D., 212, 230), which paragraph has reference only to the act of February 15, 1901 (31 Stat., 790), in that it contains an additional drawing showing the buildings and other structures to be erected on the power sites.

It is not the purpose of section 2 of the act of May 11, 1898, *supra*, to enlarge the act of March 3, 1891, *supra*, by extending its provisions to other beneficiaries than those originally specified. (Town of Delta, 32 L. D., 461; Opinion, 28 L. D., 474, 476.)

In the case under consideration the use of the right of way in connection with the generation of electricity "for heat, light and power," does not appear to be "subsidiary" to the dominant purpose of promoting irrigation. The ultimate end attained may be the irrigation of arid land, as set forth in the supplemental showing, but the showing made fails to convince the Department that the right of way applied for can properly be granted under the law by virtue of which the right is claimed.

Counsel ask that in the event the application can not be accepted as presented, it be returned with direction that action thereon be suspended and opportunity afforded applicant to make a further showing along lines indicated by the Department. If this is intended as a request that opportunity be afforded applicant to amend his application so that it may be considered under the act of February 15, 1901

(31 Stat., 790), the Department sees no objection to granting a suspension for a reasonable time. If, however, suspension is desired in order that a further showing may be made in support of the application as presented, the nature of which showing is to be indicated by the Department, the request must be denied. The Department can not assume the burden of pointing out to applicants for right of way the particular facts necessary to establish the right asserted in each particular case. It can and must pass upon the sufficiency of the proof offered, but it can not in advance set forth "specifically" the nature of such proof.

The decision appealed from is hereby affirmed.

RIGHT OF WAY—PURPOSE FOR WHICH DESIRED—ACT OF FEBRUARY 1,
1905.

NORTHERN CALIFORNIA POWER CO.

The rights of way granted by the act of February 1, 1905, are limited to municipal and mining purposes, including the milling and reduction of ores, and an application under that act should not be allowed where it appears that the chief purpose for which the right is desired is the generation of power for commercial use and that its utilization for mining operations is merely incidental to such purpose.

*First Assistant Secretary Pierce to the Commissioner of the General
Land Office, July 31, 1908. (F. W. C.)*

September 27, 1906, you referred to the Forester the map of location and other papers constituting the application by the Northern California Power Company for right of way under the act of February 1, 1905 (33 Stat., 628), on account of the location of its proposed reservoir and pipe line in the Shasta National Forest, in the State of California.

Reporting thereon under date of February 28, last, the Secretary of Agriculture suggests that the application should not be approved as filed but that the applicant should be required to amend his application by applying under the provisions of the act of February 15, 1901 (31 Stat., 790), for the reason that the applicant is a general commercial power company. Statements made by the officers of the company to the Forest Supervisor are to the effect that this is a ten-million-dollar project, and that the privilege sought is desired for commercial purposes. It is also represented that the approval of the application as filed would be detrimental to forest reserve interests and would be unfair to other similar projects constructed and in course of construction by reason of permission given under the act of February 15, 1901, *supra*.

The act of February 15, 1901, provides for the granting of a permission for the use of the right of way over the public lands, forest and other reservations of the United States to commercial power companies and others desiring to generate, use and distribute power, and in the administration of this act within forest reserves it is reported that the granting of the privilege is conditioned upon the payment of certain charges which can not be exacted if the application be approved under the act of 1905, as filed.

Section 4 of the act of February 1, 1905, reads as follows:

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the state or territory in which said reserves are respectively situated.

It is unnecessary to determine at this time the exact nature of the grant herein made, but it is clear that the uses to which the right of way granted may be applied are limited to municipal and mining purposes including the milling and reduction of ores and that the rights can be enjoyed only "during the period of their beneficial use."

This act was evidently drawn in the sole interests of municipalities and miners, and the limitations upon the use of the privilege granted are such as to authorize, if not demand, especial scrutiny of the purposes of the projectors of the enterprise before giving approval to an application filed under said act.

Even if the privileges sought might be used in the operation of mining property, owned or controlled by the applicant, where it appears that this use would be but incidental to the real purpose of the projectors, which is to generate power for commercial purposes, the application should be rejected unless, after due opportunity, the application is amended and the right sought under the act of 1901, for it was clearly never intended by the act of 1905 to confer upon commercial power companies greater privileges within forest reserves than might be enjoyed elsewhere upon the public domain, which would seem to be the effect of the approval if given under that act.

Resident counsel for the Northern California Power Company has been fully advised of the adverse report of the Secretary of Agriculture upon his application and has been fully heard, both orally and by brief. While he contends that all existing regulations have been complied with and that the Department is without authority to inquire into the purposes of the projectors, where the application follows the language of the statute, he takes no specific exception to that portion of the adverse report of the Secretary of Agriculture wherein

it is represented that the applicant company is a commercial power company and that the privilege in question is sought for commercial purposes.

Upon the record as made, therefore, it is the opinion of this Department that the application can not be approved, as filed, under the act of February 1, 1905, and the papers are herewith returned with direction that the company be advised of this holding and afforded a reasonable time within which to amend its application so that the privileges desired may be sought under the act of February 15, 1901, and its priority thus maintained, in which event, however, the application will be forwarded to the Department of Agriculture for consideration and final disposition; otherwise its application will stand rejected.

MILITARY BOUNTY LAND WARRANT—LOCATION BY ASSIGNEE—PROOF OF OWNERSHIP.

HOPKINS v. BYRD.

As a general rule a decree of a court adjudicating the ownership of a military bounty land warrant will be accepted as sufficient evidence of ownership where it appears that the court had jurisdiction of the parties and the subject-matter; but the mere fact that the court assumed to decree as to such ownership will not prevent the land department from inquiring into the jurisdictional facts upon which the court acted.

The land department having passed upon the validity of an assignment of a warrant, and recognized the right of the assignee to locate or assign the same, the question as to the regularity of the assignment should not be reopened after the warrant has been located by a subsequent assignee who purchased upon the faith of that action, where no adverse claim is asserted or interest of the government involved.

Where however the decree of the court was accepted and the validity of the assignment recognized in the face of a caveat charging facts showing *prima facie* that the alleged assignment was invalid and that the caveator was the true and lawful owner of the warrant, and without notice to him, the Department may require the locator of the warrant, even though he may have purchased upon the faith of the action of the land department recognizing the validity of the assignment, to show that title to the warrant passed out of the warrantee by lawful conveyance to those under whom he claims.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, July 31, 1908.* (E. F. B.)

J. S. Byrd has appealed from the decision of your office of April 8, 1908, holding for cancellation his location of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 3 N., R. 17 W., Jackson, Mississippi, with military bounty land warrant No. 24921 issued under the act of 1855, for 80 acres, to Elizabeth Cooper, widow of Benjamin Cooper, private

in Captain Bullard's Company, Kentucky Militia, War of 1812, and requiring appellant to show cause why the warrant should not be delivered to John T. Hopkins, who filed a caveat against the location claiming to be the owner of the warrant as heir and assignee of Mary Ann Hopkins.

The locator claims title to the warrant through mesme assignments under a decree issuing out of the district court of the city and county of Denver, Colorado, in the suit of William E. Moses against Elizabeth Cooper, the unknown heirs of Elizabeth Cooper, Mary A. Hopkins, and others, adjudging the said William E. Moses to be the sole and absolute owner of said warrant.

It does not appear either by endorsement upon the warrant or from any other paper in the record that Elizabeth Cooper, the warrantee, executed an assignment of the warrant or parted with her interest in it while in life.

It does appear, however, from the records of your office that by letter dated January 24, 1887, Little and Simpson of Emporia, Kansas, enclosed and sent to your office said warrant No. 24921, stating that it belonged to John T. Hopkins of that place, who wanted to have it assigned so he could use it, and added: "The facts as we understand them are these: Elizabeth Cooper died leaving Mary Ann Hopkins as her only heir by Benjamin Cooper but had other children by second marriage. Mrs. Hopkins is still alive and desires to fix the warrant so as to be available to her son." They asked for instructions. The endorsement on the jacket containing this letter is: "Answered and warrant returned January 31, 1887."

There is endorsed upon the warrant an assignment by Mary A. Hopkins, evidently executed in blank and acknowledged August 11, 1887. The name of M. L. G. Wheeler, in a different handwriting, was apparently inserted afterwards as assignee. Below this assignment is the endorsement: "This May 27, 1892, John T. Hopkins."

It also appears from your records that in 1902 John Hopkins wrote to your office relative to said warrant No. 24921, stating that it had been transferred to him and had been lost. He was advised by your office that its records do not show a location of said warrant, and the writer was instructed to file affidavit as to his ownership of the warrant and loss of the same; that if his efforts to find the warrant failed he should apply to the Commissioner of Pensions for the issuance of a duplicate.

Pursuant to such advice he executed an affidavit stating that he is the legal owner of said warrant, and that his mother, the said Mary A. Hopkins, was the daughter and only living heir of Elizabeth Cooper, deceased; that said warrant was legally transferred to him and while in his possession in the City of Everett, State of Washington, was lost or accidentally destroyed. The affidavit was trans-

mitted to your office where it was received and made of record June 3, 1904.

May 31, 1904, the Commissioner of Pensions requested of your office information as to whether a caveat had been filed against the issuance of a patent on said warrant. June 6, 1904, he was advised that the warrant had never been located, and that a caveat against its location had been filed September 4, 1903, by John Hopkins, claiming that the warrantee died leaving Mary Ann Hopkins (daughter) as her sole heir and that the caveator was a son of said Mary A. Hopkins and owner of the warrant as assignee.

Such were the facts disclosed by the records of your office as to the claim to ownership of this warrant when William E. Moses, September 19, 1904, submitted it for approval as to his assignment of the warrant to the W. E. Moses Land Scrip & Realty Company, made September 14, 1904. He submitted at the same time a transcript of a decree from the district court in and for the city and county of Denver, State of Colorado, adjudging William E. Moses to be the sole and absolute owner of said warrant. Moses was notified by letter of September 22, 1904, that the right of the W. E. Moses Land Scrip & Realty Company "to use or assign said warrant herewith returned will be respected by this [your] office."

On the same day (September 22, 1904) the W. E. Moses Land Scrip & Realty Company, at Denver, Colorado, assigned the warrant to James Sidney Byrd who located it September 29 thereafter.

The title of Byrd rests solely upon the decree issuing out of the district court in Colorado, in the suit brought by William E. Moses against Elizabeth Cooper, the unknown heirs of Elizabeth Cooper, Mary A. Hopkins, M. L. G. Wheeler and Ardilla G. Robinson, all of whom were served by publication and made default except Ardilla G. Robinson who was personally served and who answered admitting all the allegations in the bill.

This has all the appearance of a friendly suit in which the complainant's immediate assignor sought to make good her title by admitting the allegations in the bill, whatever they may have been. It does not appear from the transcript what the bill alleged or what was admitted by the answer, nor does it appear how the defendant Robinson acquired her title, nor the source of title of the intermediate transferees from Mary A. Hopkins, who it is admitted came lawfully into possession of the warrant as the immediate successor in title from the warrantee. John F. Hopkins the caveator claims under assignment direct from her.

It is unnecessary to discuss the question as to whether the decree of the Colorado court in a proceeding wherein the warrantee or those entitled by law to her succession were not personally served will preclude the land department from requiring satisfactory proof of own-

ership in every one who seeks to locate such warrant. That question was fully discussed in the case of Homer Guerry (35 L. D., 310), wherein it was directly determined as to a decree in a similar proceeding that the court had no jurisdiction by decree in equity to quiet title, or to adjudicate title to chattel property in possession of the complainant, or to acquire jurisdiction in such proceeding without personal service upon those whose rights would be affected thereby. That decision was adhered to upon motion for review (January 31, 1907) and upon motion for re-review (February 21, 1907). In the decision upon review it was clearly stated that if the record in any particular case shows proper parties and jurisdiction of the court over the subject-matter and the parties, the decree should be recognized, but that it would be "contrary to well-settled legal principles to give any credit or effect whatever to the pronouncement of a court in a matter where the real adverse party was not before it and there was no jurisdiction of either the parties in interest or the subject-matter involved."

The principles announced in that case apply with greater force in this because at the time said decree was obtained the caveat filed by John T. Hopkins against the location of said warrant and the proceedings instituted by him to obtain a duplicate were pending before your office.

It is contended, however, that the decision of your office as to the validity of said decree was obtained prior to the assignment of the warrant to appellant and that having bought upon the faith of that decision he should be protected as an innocent purchaser.

As a general rule such decrees will be accepted as sufficient evidence of ownership and in many instances a decree of court will be required, but it must appear that the court had jurisdiction of the parties and the subject-matter. The mere fact that the court assumed to decree as to the ownership of a warrant will not prevent the Department from inquiring into the jurisdictional facts upon which the court acted, because it is the province of the land department to determine whether assignments are sufficient independently of the adjudication of the courts.

The principle is equally well founded that where your office in the exercise of duties devolving upon it by law has determined as to the validity of an assignment of a warrant the question as to the regularity of such assignment should not be reopened after the land has been located by a subsequent assignee who purchased upon the faith of that decision where no adverse claim is made and the interest of the Government is not involved. That was the rule announced in the unreported case of Herbert D. Stitt, decided April 30, 1907. See also "Instructions" (36 L. D., 11).

But it has no application in this case. The action of your office of September 22, 1904, giving approval to the assignment by Moses and recognizing title in him under the decree of the Colorado court was not only taken without notice to Hopkins but in the face of his caveat and his application for the issuance of a duplicate, alleging facts which show *prima facie* that he is the true and lawful owner of the warrant and that it passed out of his possession either by loss or theft.

The locator should therefore be required to show by satisfactory proof that title to the warrant passed out of the warrantee by lawful conveyance to those under whom he claims, and if he fails to submit such proof the warrant should be delivered to John T. Hopkins who, however, should be required to show his right to the same, by proper transfers or acknowledgments from all the heirs of Elizabeth Cooper, as the warrant after her death was a part of the assets of her estate and not of the estate of her husband, the soldier.

In the event that the locator fails to show title to this warrant he may be allowed to make substitution of a warrant of which he is shown to be rightly possessed if it be shown by satisfactory proof that he made a *bona fide* purchase of the warrant here in question and made his location thereof upon the faith of the decision of your office as to its validity and of the title of Moses within such reasonable time as may be fixed by your office.

Your decision as thus modified is affirmed.

HOMESTEAD ENTRY—QUALIFICATION—NATURALIZATION—FILIPINO.

OPINION.

Section 30 of the act of June 29, 1906, provides for the naturalization of native Filipinos, owing permanent allegiance to the United States, who are residents of one of the States or Territories of the United States. Such persons must make or must have made since the passage of the act of June 29, 1906, the declaration, required by section 30 of that act, of his intention to become a citizen, at least two years before his application for naturalization, and must have resided five years within one of the insular possessions of the United States.

Attorney-General Bonaparte to the Secretary of the Interior, July 10, 1908.

The questions presented in your note of June 30, 1908, to which I have the honor to respond, are, in substance, whether under the act of June 29, 1906 (34 Stat., 596, 606), a native Filipino owing permanent allegiance to the United States, who is a resident of one of the States, can become, by naturalization, a citizen of the United States, so as

to entitle him to the benefits conferred upon citizens of the United States and those who have declared their intention to become such, by the acts providing for preemption and homestead entries of the public lands, and, if so, what steps are necessary thereto.

The naturalization law, as it stood at the passage of the above act of 1906, provided (section 2169, Revised Statutes) that—

The provisions of this Title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent.

This is the present law, except as modified by section 30 of that act. This section seems to have been framed expressly for the people of our insular possessions, who are there accurately described and to whom alone the section can refer. It is as follows:

That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law.

This describes exactly the status of inhabitants of the Philippine Islands. They are not aliens, for they are not subjects of, and do not owe allegiance to, any foreign sovereignty. They are not citizens, yet they "owe permanent allegiance to the United States," since they owe and can owe it to no other sovereignty. The applicant is not to be required to renounce allegiance to any foreign sovereignty, because he owes none.

It is my opinion that this section authorizes the naturalization of the persons to whom you refer, they being residents of one of the States or Territories of the United States.

Your further question is as to the steps to be taken by a Filipino thus resident in order to secure such naturalization.

The law, before the act of 1906, excluded Filipinos from the right of naturalization, and therefore all proceedings to that end must have been taken after the passage of that act and according to its provisions; and a declaration previously made of intention to become a citizen, being unauthorized by any law when made, was and is of no force or efficacy and will not serve as the preliminary declaration required by the present statute.

All persons intending to become naturalized under section 30 of the act of June 29, 1906 (34 Stat., 606), must make, or must have made, since its passage, the declaration there required of intention to become a citizen at least two years before their application for naturalization.

Then five years' residence in any of our insular possessions will be, under that section, a compliance with the clause requiring five years' residence in the United States.

STATE SELECTION—UNIVERSITY GRANT—UNSURVEYED LANDS.

TERRITORY OF ARIZONA.

The right of the State of Arizona to make selection in satisfaction of the grant for university purposes made by the act of February 18, 1881, is limited to lands which have been identified by survey, and the State acquired no such right by an attempted selection of lands prior to survey as would prevent the subsequent reservation thereof by the government.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, August 3, 1908.* (E. O. P.)

The Territory of Arizona has appealed to the Department from your office decision of January 28, 1908, holding for cancellation the undisposed of selections covered by list No. 1 (Prescott series), filed December 27, 1882, on account of the grant made by the act of February 18, 1881 (21 Stat., 326), in aid of a university. The tracts involved are the S. $\frac{1}{2}$, Sec. 30, W. $\frac{1}{2}$, Sec. 32, T. 20 N., R. 5 E., E. $\frac{1}{2}$, Sec. 34, T. 20 N., R. 6 E., SW. $\frac{1}{4}$, Sec. 34, T. 21 N., R. 5 E., Phoenix land district, Arizona.

At the date said selection was filed all of the tracts were unsurveyed and it was not until June 22, 1904, and July 1, 1904, that the plats of survey of the SW. $\frac{1}{4}$ of said Sec. 32, and the E. $\frac{1}{2}$, Sec. 34, T. 20 N., R. 6 E., were filed, the remaining tracts being still unsurveyed. April 12, 1902, all the land described was reserved on account of the San Francisco Mountains Forest Reserve, since which time it has not been subject to selection by the Territory.

Your office held the selection bad because made of unsurveyed land. The Territory contends that by the act of February 18, 1881, *supra*, it was authorized to make selection prior to survey, and inasmuch as its right was initiated long prior to withdrawal of a part of the land selected for forestry purposes, its selection should be approved.

While the decision cited by your office as authority for the action taken (*Benson v. State of Idaho*, 24 L. D., 272) is not necessarily controlling here, inasmuch as the act there under consideration is different from the one under which this selection was made, yet the Department is of opinion the action taken is correct.

While the act making the grant of land for university purposes directs that it be immediately selected and withdrawn from sale or other disposition, the impossibility of identifying the land selected

prior to survey, of necessity limited compliance with such direction to the selection and withdrawal of lands of that character. Had no adverse claim intervened between selection and the survey of the land the selection might have been allowed to stand, but as all the land was included in a forest reserve prior to survey this can not now be done, and the action of your office is for the reasons herein given, affirmed.

DESERT LAND ENTRY—CHARACTER OF LAND.

CHAFFIN *v.* SWIFT.

The character of land at the date of desert land entry thereof controls in determining whether the land is subject to such entry, and the fact that the entryman purchased the improvements of a prior desert entryman for the same land does not entitle him to have the character of the land determined as of the date of the prior entry.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, August 3, 1908.* (E. O. P.)

John Chaffin has appealed to the Department from your office decision of May 5, 1908, rejecting his application to contest the desert land entry of Hannah A. Swift, made January 13, 1902, covering, as amended December 30, 1906, the SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 21 N., R. 24 E., Hailey land district, Idaho.

The entry in question was made prior to survey and presumably from the statements made in your decision that the final proof offered by Swift was "approved April 3, 1907," the official survey has not yet been completed.

The charges made the basis of contest are that the land is not desert in character, and that no ditches have been constructed or water conducted upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 31. As to the remaining tracts, it is not alleged that they have not been reclaimed, but it is contended that reclamation was effected prior to entry by Swift through the efforts of one Wilson, whose improvements were purchased by her.

Your Office held that inasmuch as Swift had purchased the improvements of Wilson she was entitled to credit on account thereof, and, as it was not alleged that the land had not been reclaimed and one-eighth thereof cultivated, it was immaterial that reclamation may have been accomplished prior to the entry of Swift. Conceding, for the moment, the correctness of this conclusion, it can have no application to that part of the charge touching the alleged failure of Swift to conduct water upon the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 31, and if the truth of this

allegation were established, it would certainly call for the cancellation of Swift's entry as to these tracts.

The finding of your office that the charge made against the remainder of Swift's entry is insufficient, is based upon the holding that because she was entitled to credit for Wilson's expenditures and improvements she was also entitled to rest upon the character of the land prior to the time he made them. The rule established by the Department is opposed to this view (*Rivers v. Burbank*, 9 C. L. O., 238; *Taylor v. Rogers*, 14 L. D., 194; *Campbell v. Sutter*, 16 L. D., 40). Under these decisions, it is clear the character of the land at the date desert-land entry thereof is made must control, and measured by this standard, the allegations contained in Chaffin's affidavit of contest is sufficient.

The other matters set up by Chaffin touching the qualifications of Wilson to make entry are, as held by your office, wholly immaterial.

For the reasons herein given, your decision is reversed in so far as it denies a hearing on the allegations touching the character of the land at the date of Swift's entry and attacking the final proof offered by her to establish reclamation of the SW. $\frac{1}{4}$ NW $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 31.

**CONFIRMATION—GENERAL ORDER OF SUSPENSION—DIRECT CHARGE—
LISTING FOR INVESTIGATION.**

MORGAN v. ROWLAND.

A general order suspending all entries of a specified class within a given territory will not bar confirmation under the proviso to section 7, act of March 3, 1891, but there must be a direct charge against each particular entry, or they must be specifically listed for investigation within the two-year period, in order to stop the running of the statute.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, August 3, 1908.* (A. W. P.)

An appeal has been filed on behalf of George R. Rowland from your office decision of February 27, 1908, wherein you affirm the action of the local officers and hold for cancellation his homestead entry No. 13040, embracing the SW. $\frac{1}{4}$, Sec. 2, T. 9 S., R. 10 W., Portland, Oregon, land district.

It appears from an examination of the record in this case that Rowland made entry of said tract on September 11, 1900, and that on May 6, 1902, the same was commuted to cash entry No. 7397, Oregon City (now Portland) series. It further appears that the land embraced therein was a part of the former Siletz Indian reservation, and that because of certain communications received by your office

relative to said lands you issued instructions on March 25, 1903, to Division "C" of your office directing suspension of action on all commuted homestead entries in said reservation, including townships 6, 7, 8, 9, and 10 south, ranges 9, 10, and 11 west, above land district. By your letter of the following day you instructed a special agent to investigate and make report upon all homestead entries embraced within this territory. It further appears that on November 14, 1903, based on the recommendation of another special agent, your office issued a general order suspending all entries of said lands until further instructions. It does not appear, however, that any action was taken in respect to the entry in question until March 31, 1906, when as result of a communication from the entryman complaining of the long delay in the issuance of patent on his said entry, your office instructed Chief of Field Division Dixon to promptly direct an examination thereof and report thereon. Such examination was thereafter made on July 25, 1906, by Special Agent McMechan, who made adverse report thereon August 7th following, which was forwarded to your office with the approval of the Chief of Field Division. Based thereon, it appears that your office by letter of September 15, 1906, ordered a hearing upon the charges made by said special agent. Subsequently, and after considerable correspondence, the contestant herein, James R. Morgan, was, by letter of April 11, 1907, allowed to intervene and prosecute the government proceeding theretofore instituted by your office. Upon due notice thereof hearing was had before the local officers on July 17, 1907, and as result of the testimony offered thereat, they found against the entryman on August 29, 1907, and recommended cancellation of his said homestead entry. Upon appeal therefrom, as heretofore stated, your office upon consideration of the case affirmed their action and held Rowland's entry for cancellation.

The case is now before the Department upon appeal from your said office decision. As a basis for said appeal seven specifications of error are alleged, but in the view of the Department it is only deemed necessary to refer to that holding that your office erred in assuming jurisdiction of the case, and in not holding that said entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), and that it was therefore error to permit Morgan to intervene and become the real party contestant in this case long after such confirmation of the entry. This proviso is as follows:

That after the lapse of two years from the date of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent.

In the case of John S. Maginnis (33 L. D., 306), wherein the question was fully considered, it was said, according to the syllabus, which appears to sum up accurately the principle announced therein, that:

Any proceeding by the government challenging the validity of any particular entry, or any investigation initiated because of the supposed invalidity of such entry, before the lapse of two years from the date of final certificate, is effective to take the entry out of the confirmatory operation of the proviso to section seven of the act of March 3, 1891.

In the case at bar, it will be noted that while your office had on March 25, 1903, suspended action on all commuted homestead entries embraced in the Siletz Indian reservation, and on the following day directed an investigation and report thereon, and on November 14th following had suspended all entries of said lands, yet there was not at that time any direct charge made against this entry, nor was it ever embraced with others and specifically listed for investigation. In fact, as heretofore recited, no such direction was given as to the entry in question until by your office letter of March 31, 1906.

It would therefore seem upon careful consideration that there was no such contest, protest, or proceeding initiated by the government within two years from the date of issuance of the cash certificate on this entry, which would prevent confirmation thereof under the said proviso heretofore set out.

Careful examination of all the papers in this case, as well as the records of your office, discloses that a like view was entertained by you, for in your letter of July 18, 1907, to Acting Chief of Field Division Neuhausen, it was stated that by letter "P" of June 8, 1907, the said order of November 14, 1903, suspending all action looking to the patenting of entries within this territory, was modified so as to apply only to those entries made prior to the issuance of said order, which were not confirmed under the act of March 3, 1891, *supra*; and further that said order of November 14, 1903, was construed not to prevent the running of the statute against those entries suspended thereunder which were not listed to a special agent for investigation or against which no specific charges of fraud were brought before two years had elapsed since issuance of a final certificate. In other words, there must be a direct charge against a specific entry, or that the entries must have been specifically listed for investigation within this two year period in order to prevent confirmation thereof.

Entertaining the belief that this is the correct view, the Department must hold that the entry in question was confirmed. The decision of your office is therefore reversed, the contest dismissed, and the entry passed to patent.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT IN BLANK—
EVIDENCE OF OWNERSHIP.

THOMAS E. RAMSAY.

The assignment in blank of a military bounty land warrant, if otherwise regular, merely vests the right of property in the purchaser to whom it is delivered and impliedly authorizes him to fill the blank with his name when he locates or assigns the warrant, but does not make it an instrument negotiable by mere delivery nor vest title in a mere finder or purloiner, and it is within the power of the land department when a warrant so assigned in blank is presented for location to require evidence showing that the holder is in fact the lawful owner thereof.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, August 6, 1908.* (J. R. W.)

Thomas E. Ramsay appealed from your decision of May 11, 1908, requiring further proof of his title to military bounty land warrant 55,771, under act of September 28, 1850 (9 Stat., 520), to Mary Kuykendahl, widow of George Kuykendahl, private, Ohio militia, war of 1812, located by Ramsay on SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 15, T. 5 S., R. 8 W., St. Stephens meridian, Jackson, Mississippi.

The assignment was in blank by Nicholas and Margaret Kuykendahl, as heirs of Mary, shown by affidavit of George Kuykendahl to be her sole surviving heirs. Ramsay's title was by transfer of W. E. Moses Land Scrip and Realty Company, by mesne conveyances, from G. R. Peacock, alleged to be direct transferee of the warrantee's heirs. July 6, 1906, the District Court, Denver county, Colorado, rendered decree in suit by William E. Moses against Nicholas and Margaret Kuykendahl, G. R. Peacock, and others, purporting to quiet title to the warrant in Moses. Peacock, personally served, answered admitting Moses's claim. The other defendants, served by publication only, appeared not. May 17, 1907, you rejected Ramsay's application for unsatisfactory evidence of title to the warrant. August 8, 1907, you held the location for cancellation because the land was not subject to warrant location. Ramsay appealed from both decisions.

February 5, 1908, the Department affirmed your decision as to the requirement for additional proof of Ramsay's title to the warrant, and, you having accepted George Kuykendahl's affidavit as sufficient evidence of the warrantee's death and of the succession of the assignors as her sole heirs, you were advised that:

The title being in said heirs at that date it passed by their duly executed assignment in blank and conveyed all their right, title, and interest in the same by mere delivery, but before the warrant can be located that blank must be filled with the name of the assignee, showing, *prima facie*, a complete and perfect title in the locator. Jake Salmen (35 L. D., 453). * * * While that decree is binding upon Peacock and Moses, and will estop them from denying

their title, it does not preclude the Department from requiring such reasonable proof as to the locator's ownership of the warrant * * * so as to vest the assignee with all the rights of the original owner of the warrant on location. The proof required by your office is not unreasonable. If it is true, as stated in the complaint of Moses and the answer of Peacock, that said warrant was for a reasonable consideration transferred and assigned by the heirs of the warrantee to Peacock, there should be no difficulty in securing his [Peacock's] affidavit to that effect.

In response to your requirement so affirmed, Ramsay procured and filed, in addition to the chain of assignments, regular in form, from Peacock, Moses, and the W. E. Moses Land Scrip and Realty Company, affidavits of Peacock and Moses confirming the fact of such assignments, and Peacock further stated that at time of his assignment of the warrant—

he was the lawful owner thereof, having theretofore purchased the same for a valuable consideration from the heirs of the warrantee above named, which will more fully appear by the assignment of the heirs of said assignee in favor of affiant, attached to the military bounty land warrant above described.

You held this to be too general and vague to constitute satisfactory evidence of the alleged assignment by the heirs to him, August 31, 1853, and refused to accept it, and held that in view of the fact that the decree in the suit at Denver, in 1906, recited that evidence was submitted and heard, upon which the court then found the warrant was transferred by the heirs to Peacock in 1853, there should be no difficulty in producing that or satisfactory evidence at this time.

In view of the many frauds perpetrated in claims of assignments of land warrants, the Department deems you are fully justified in requiring full and circumstantial narration of facts from any one holding and claiming title to a land warrant assigned, as this is, in blank. It is unusual that such instrument reposes fifty-three years in one hand without attempt of the holder to locate or negotiate it. The transferee of a land warrant in 1853 must now be probably aged upward of seventy-six years, for such transfers are not usually made to minors. Peacock has not stated his age. The assignment in blank, if otherwise perfectly regular, merely vests the right of property in the purchaser, to whom it is delivered, and impliedly authorizes him to fill the blank with his name when he claims to locate or assign it. It does not make it an instrument negotiable by mere delivery under the law merchant, nor vest title in a mere finder or purloiner. Peacock did not fill in his own name as assignee before assignment to Moses, and the warrant, as it is presented here, is one assigned in blank. Such a warrant always presents a case for determination of the land department, whether the holder, back to whose hand it can be traced, was in fact owner, by either good, equitable, or legal title.

It was shown in *Homer Guerry* (35 L. D., 310, 311) that it is not within the ordinary chancery jurisdiction to quiet or adjudicate title

to chattel property in possession of a plaintiff, and that such jurisdiction, where it exists, is purely statutory. No such statutory grant of jurisdiction was found or has been pointed out in Colorado, where this asserted decree was rendered. It was conclusive only between the parties before the court, who were William E. Moses and G. R. Peacock alone, affecting no others, though nominal parties, but not served with process. Apparently they had no interest, as they had executed an assignment in due form, except blank as to the assignee. That blank, or unnamed assignee, was the proper defendant.

You properly might reasonably require full and circumstantial disclosure by G. R. Peacock of all facts relating to any former possession and claim of ownership of such warrant resting in his knowledge and time when, for what consideration, and from whom it came to his possession, and all circumstances connected therewith throwing light upon the right of any one to claim its ownership.

Your decision is affirmed.

SURVEY OF MINING CLAIM—CORRECTION OR AMENDMENT OF SURVEY.

GOLDEN RULE &C. Co.

The terms upon which a mineral survey is made are matters of private contract between the owner of the mining claim and the mineral surveyor, and not enforceable by the land department, which, in case of default on the part of the surveyor, has no power to designate another surveyor to make a correction or amended survey at the expense of the bondsmen of the defaulting surveyor, or to require the latter to correct his work without expense to the claimant, or to impose upon the claimant the condition that an amended or correction survey, for which it may devolve upon him to apply, shall be made without expense to the surveyor who made the original survey.

It is not only the right, but the duty, of the appointing power to revoke the appointment of an incompetent or negligent mineral surveyor, that future impositions upon mining claimants may be avoided.

In the event a mineral surveyor neglects or refuses to make necessary corrections or amendments of a survey executed by him, it devolves upon the mining claimant to apply for an amended survey to meet the requirements.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, August 6, 1908.* (F. H. B.)

The Golden Rule Consolidated Mining and Milling Company has appealed from your office decision of November 8, 1907, involving the survey, No. 549, of its group of mining claims in Oregon, in which the surveyor-general for that State was directed to notify the company that it would be—

allowed sixty days from date of service of notice within which to make application to your office for an amended survey of said claims, without expense to

the mineral surveyor (26 L. D., 575), in default of which and of appeal, the approval of said survey 549 will be revoked, and so noted on the records of your office and of the proper district land office, without further notice.

From the record now before the Department it appears that in the course of a subsequent mineral survey (No. 594) of another group and for other parties the mineral surveyor (Collier) making it reported survey No. 549, by mineral surveyor Alonzo Gesner, in error (as stated by the surveyor-general, "in fact, in many instances, greatly in error"), and that Gesner was thereupon called upon by the surveyor-general to make a prompt and thorough examination upon the ground and to report the result under oath. This, it seems, Gesner has thus far failed to do, though several times cited thereto; and inasmuch as, pending such examination and ascertainment, the surveyor-general could not approve the later survey, No. 594, the latter officer recommended to your office that mineral surveyor Gesner's bondsmen be required to furnish, at their expense, a competent and acceptable mineral surveyor to make the necessary report upon survey No. 549, and that Gesner's appointment be revoked.

Pursuant to direction by your office, the surveyor-general called upon Gesner to show cause, within sixty days therefrom, why his appointment as mineral surveyor should not be revoked, and received from him the following response:

Referring to the Hon. Commissioner's letter relating to corrections to be made in the survey of Mineral Survey No. 549, for the Golden Rule Consolidated Group of Mining Claims, I would say that I have already made one trip at my own expense to make such corrections as was necessary to harmonize my survey with Deputy Collier's, but the company could only, or rather furnished me assistants who were interested in the mining property; so the survey fell through with. I have on several occasions called on the Manager of the Consolidated Group, requesting him to furnish me assistants and money necessary to defray my expenses in making said survey, but without results; in fact, I do not believe they care to have the survey perfected at the present time.

I will say in conclusion that I have not got the money to meet the necessary expense, and I do not think that I should be required to do so. I am ready to go, and have been ready and willing at all times to go, if the company would meet the necessary expense and furnish the help necessary to execute the survey.

This the surveyor-general transmitted to your office, remarking in that connection that Gesner "practically admits that he is in error," and recommended at the same time that he be authorized to approve survey No. 594. The papers having been returned, after examination in your office, for his further recommendation in the premises, the surveyor-general recommended that Gesner's appointment as a mineral surveyor be revoked; that the claimant of the mineral group so surveyed by Gesner be called upon to apply for an amended survey; and that the returns of mineral survey No. 594 be approved, if found to be regular.

By the decision first above mentioned your office held Gesner's explanation of his inability to harmonize his survey (No. 549) with survey No. 594 to be satisfactory, and directed the surveyor-general to call upon the present appellant to apply for an amended survey, as and upon the terms set forth in the above extract from that decision.

Under oath the appellant alleges a contract between it and Gesner for the execution of the survey of its group of mining claims, in which, among other things, the latter party agreed that any errors on his part in the execution of the survey should be corrected at his expense; that if, as stated in his letter above quoted, he made a trip at his own expense for the purpose of harmonizing the two surveys, he made it pursuant only to the said contract; that the statement in his aforesaid letter to the effect that the appellant company could only, or rather did, furnish him assistants who were interested in the mining claims, is untrue; that, notwithstanding the fact that by the terms of said contract Gesner should himself have furnished his assistants and made the correction survey, the appellant did, after the resurvey was ordered, at its own expense furnish two men to assist Gesner and the mineral surveyor who reported the survey in error, and the latter, at a date agreed upon with Gesner and accompanied by two other absolutely disinterested men, went upon the ground to meet Gesner and assist in making such additional surveys as were required to correct errors and harmonize surveys Nos. 549 and 594; that Gesner had agreed to be upon the ground at that time but failed to appear, and this appellant company was compelled to, and did, pay the two men referred to for going upon the ground at that time for the purpose stated; that the company does desire to have its survey perfected and harmonized with said survey No. 594, and has paid Gesner in full as per contract; and appellant therefore asks that Gesner be required to perfect and harmonize the survey, at his own expense, or that, if he shall refuse so to do, his appointment as mineral surveyor be revoked and another mineral surveyor designated to make the said survey at the expense of Gesner and his bondsmen.

From the foregoing recital it is clear that, so far as concerns the question of the cost of an amended or correction survey, the case is controlled by the case of *Richard G. Anderson* (26 L. D., 575), cited by your office, and appellant's contention to the contrary can not be sustained. That decision proceeded upon the assumption (which could not be affirmed or negatived from the record) that the defective survey therein involved might have been the fault of the mineral surveyor who had been directed by your office to make an amended survey "without expense to the claimant." Holding that there was

no authority of law for the imposition of the terms quoted, and after citing the pertinent provisions of section 2334, Revised Statutes, the Department said:

Under this statute the mineral claimant may employ any deputy mineral surveyor to do his field work. He may also contract on the basis of such compensation as may be agreed upon between the contracting parties, subject only to the limitation of a maximum charge which is fixed by the Commissioner of the General Land Office. It therefore is a private contract between the parties. If the claimants have been injured by the incompetent or inaccurate work of Anderson, they are not without remedy on the contract. Inasmuch as he is an officer of the United States, proper administrative action on the part of your office would seem to be a due consideration of any charge of official misconduct which may be made against him in connection with this matter, and after giving him a full and fair opportunity to be heard thereon to make such recommendation to the Department as the circumstances of the case appear to warrant.

The nature and extent of the errors reported, in the case at bar, in the survey of the appellant's group of claims do not appear from the record before the Department; but if the defects are so serious that they can be corrected or reconciled only by a re-examination or resurvey in the field, and Mineral-Surveyor Gesner refuses or fails to proceed accordingly upon the direction of the surveyor-general, it will necessarily devolve upon the appellant, if the survey is ultimately to be approved, to procure the requisite action upon its own application and responsibility. Whilst, in such a case, it is ordinarily the duty of the surveyor-general to address his notice of flaws apparent in the survey to the mineral surveyor in the first instance, if he is still available for that purpose, and within the province of that supervising officer to call upon the surveyor to do such additional field or other appropriate work as is necessary to the approval of the survey, the matter immediately in issue is the survey itself, for the perfection of which the surveyor-general, having no alternative in the event of the mineral surveyor's default, must finally look to the claimant for whom it is made. After all, the mineral surveyor's direct and real obligation, under the law and pursuant to his contract of employment in each case, except as he is controlled by the supervisory authority of the surveyor-general in the technical execution of the survey and subject to the limitation of maximum charges for such services which may be fixed by the Commissioner of the General Land Office, is to the claimant for whom the services are rendered. Essentially a matter of private contract between the parties, it is not as such enforceable by the land department, which is equally incompetent, by parity of reasoning, irrespective of the absence of specific authority for the disbursement of the money if it could be collected, to designate another mineral surveyor to make the

correction or amended survey at the expense of the bondsmen of the defaulting surveyor.

It follows, upon the same grounds, that as the land department is without authority of law to require a mineral surveyor to correct his work "without expense to the claimant," so, on the other hand, it is without authority to impose upon any such claimant the condition that an amended or correction survey, for which it may devolve upon him to apply, shall be made "without expense to the mineral surveyor." That condition, so expressed by your office in this case, must therefore be eliminated.

As pointed out by the Department in Anderson's case, *supra*, the mining claimant who has been damnified could pursue his remedy in the courts upon the contract; or, if that were a barren pursuit, upon the procurement from your office of an officially certified copy of the mineral surveyor's bond, suit thereon, in the name of the United States to the claimant's use, should be maintainable by the latter as the real party in interest.

It does not follow, however, that the land department is altogether helpless in the matter. The provisions of section 2334, Revised Statutes, pursuant to which mineral surveyors are appointed, expressly contemplate competency, in its broad sense, on the part of those whose services are to be called into requisition in the survey of mining claims, and therefore a reasonable assurance thereof, to the owners of mining claims who shall have occasion to employ such surveyors, from the fact of appointment under the statute. When any surveyor so appointed is thereafter found to be incompetent to perform the services required of him, or so neglectful or contemptuous of the interests of his client as to fail or refuse to correct an unacceptable survey made by him which he ought to correct, it is not only the right but the duty of the appointing power to revoke his appointment, that future impositions upon others may be avoided.

In the present case, it will be observed, the appellant has substantially disputed, under oath, the showing submitted by mineral surveyor Gesner in excuse of his failure to make the required examination in the field and reconcile, or assist in reconciling, the two surveys in question. Until the facts in that behalf are found it is deemed inadvisable to consider the sufficiency or insufficiency of any of the grounds relied upon by Gesner as affecting the question of the revocation of his appointment. Your office is therefore directed to remand the case to the surveyor-general for Oregon for a full ascertainment of the facts, within a reasonable time, each party to be afforded fair opportunity to be heard in the regular manner, the record to be thereafter promptly resubmitted to your office, with the surveyor-general's recommendations in the premises, for consideration and appropriate action.

In default of satisfactory and seasonable action on the part of the mineral surveyor, it remains for the appellant to apply for an amended survey, if the desired approval is to be had, but without obligation to the land department to relieve the surveyor of the expense involved; and the decision of your office upon that phase of the case is modified accordingly. In the matter of the showing submitted by Gesner in his own behalf, however, the action of your office is vacated, pending and subject to such further proceedings in that regard as shall be had pursuant to the foregoing direction.

RAILROAD LANDS—PURCHASER—SECTION 5, ACT OF MARCH 3, 1887.

JOHN SPIERS ET AL.

Section 5 of the act of March 3, 1887, does not confer upon a purchaser coming within its provisions a vested interest in the land, but merely grants a privilege or option to acquire title thereto, and if this privilege be not asserted and perfected within a reasonable time it is no bar to appropriation of the land by the Government for public uses.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, August 7, 1908. (G. W. W.) (J. R. W.)

O. M. Jenkins, W. W. Jenkins, and John Spiers, assignee, appealed from your decision of February 17, 1908, rejecting applications under section 5, act of March 3, 1887 (24 Stat., 556), to purchase Sec. 29 and fractional Sec. 31, T. 5 N., R. 16 W., S. B. M., Los Angeles, California.

The land is within common, overlapping, primary limits of grant, July 27, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company, opposite its unconstructed road, forfeited by act of July 6, 1886 (24 Stat., 123), and of grant March 3, 1871 (16 Stat., 579), to Southern Pacific Railroad, branch line, to which the latter grantee took nothing. *Southern Pacific R. R. Co. v. United States* (168 U. S., 1). April 13, 1898 (26 L. D., 697), after notice, these lands were restored to entry September 7, 1898.

February 27, 1888, the Southern Pacific Company, claiming under its grant, sold section 29 to F. C. Garbutt for \$320, he paying \$81.92 on purchase price and a year advance interest on that unpaid, final payment of \$256 falling due February 23, 1893, with seven per cent interest payable annually, and all taxes and assessments on the land. October 19, 1888, for \$85 he assigned to W. A. Snedeker, who of date March 3, 1888 [sic], acknowledged September 12, 1898, for \$75 assigned to W. W. Jenkins. Also February 27, 1888, the railroad company similarly sold section 31 to W. W. Jenkins for \$155.12, he paying \$39.70 on purchase price and advance interest, final payment of

\$124.10 to be February 23, 1893, with like provision as to tax and interest. October 19, 1888, for \$100 he assigned to W. A. Snedeker who March 3, 1897, for \$100 assigned to Mrs. O. M. Jenkins. No further payments are shown on either contract.

March 2, 1898, the land by Executive proclamation (30 Stat., 1767) was included in the Pine Mountain and Zaca Lake Forest Reserve—

excepting from the force and effect of this proclamation all irrigation rights and lands lawfully acquired therefor and all lands which may have been, prior to date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith.

November 25, 1898, W. W. Jenkins as to Sec. 29 and Mrs. O. M. Jenkins as to Sec. 31 presented at the local land office applications to purchase under Sec. 5 of act of March 3, 1887, *supra*, but neither took steps to complete those applications. December 22, 1898, W. W. Jenkins surrendered to the railroad company the contract for section 31 and repayment was made to him. January 3, 1899, Mrs. Jenkins surrendered contract for section 29 and repayment was made to her.

January 5, 1904, John Spiers filed in the local office separate applications attached to which were assignments of W. W. Jenkins and of O. M. Jenkins, both executed November 28, 1903, each for nominal consideration, of all their rights in the respective contracts and in the lands described. Publication was made January 16 to February 13, 1904, and proof thereof and of posting notice were duly filed February 18, 1904, and proofs were taken but no payment was made or tendered until August 22, 1907.

August 22 and 23, 1907, the local office transmitted to you all the papers in the cases separately, reporting that—

the proof made at this office was satisfactory and has been held without action awaiting payment and is now reported to your office for information as to whether any reason is known why the same should not be allowed.

You communicated with the supervisor of the Santa Barbara Forest Reserve, in which the land is now included, and the Forest Service protested against allowance of applications. You held that—

the mere filing of an application to purchase said tracts under the act of 1887 was not of itself sufficient to defeat the right of the government under the reservation for forest purposes as the applicants did nothing to complete their applications and five years later practically abandoned their claims and there was nothing thereunder to assign to Spiers. The right of assignment under provisions of the act of March 3, 1887, relates to the land purchased and does not in my opinion contemplate an assignment after the party has secured return of the consideration paid to the company.

Counsel for appellants argue that—

The right to the land and right to the money was derived from different sources and were distinct rights; that to the land arose from the statute; that to the money arose from breach of the contract on the part of the railroad company.

The fixed point in the opinion of the Commissioner to which he directs attention of the Secretary is that part wherein he attempts to hold that the application of John Spiers is an attempt to defeat the rights of the Government for forest purposes. The Government has no rights inside the forest reserve except such as is given to it by section 24 of act of March 3, 1891, and the provisions therein contained do not authorize the President to establish forest reserves and extinguish fixed rights to the premises contained within boundary of the reserve.

The first contention that right to repayment from the railroad company and right to purchase the land are distinct and are of different origin, is no doubt true. Purchase of the land from the United States by a purchaser from the railroad company, nowise satisfies the company's obligation to him for breach of its contract. Nor does repayment of the money paid by the purchaser annul or take away the equitable relief offered to him by the United States of its grace in view of his misfortune. This is fully pointed out in *Americus v. Hall* (30 L. D., 388, 391-3).

At the same time, the right given by the act of 1887 was a privilege or option to acquire right and title rather than a vested right in the land. It did not touch or affect title that remained complete and unimpaired in the United States until such time as the one having this privilege should so act in exercise of it as to show intent to claim the benefit and to obtain title by compliance with the condition fixed. The United States owed him no duty, was under no obligation, but of its free grace offered him a privilege which he might seize upon or not to heal his disappointment at loss of title and disembarass his entangled affairs. There are no words of grant in the act. The effective words after description of the classes of persons and the conditions of their qualification are simply that—

it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and that thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns.

This was a mere privilege and was so held by the court in *Ramsey v. Tacoma Land Company* (196 U. S., 360, 363), that—

obviously the statute is not a curative one, confirms no title, but simply grants a privilege. We shall assume that that privilege is not one continuing indefinitely, that the land is not held free from entry until the purchaser from the railroad company has formally refused to purchase, and that he must act within a reasonable time.

It is incident to such a privilege that it must be pursued with diligence and is liable to be barred by failure to exercise it until change

of conditions make it inequitable to assert it. Thus in *Moran v. Horsky* (178 U. S., 205, 208), speaking of a right much stronger than that granted by the act of 1887, the court held:

We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. See among others *Felix v. Patrick*, 145 U. S., 317; *Galliher v. Cadwell*, 145 U. S., 368, and cases cited in the opinion. There always comes a time when the best of rights will, by reason of neglect, pass beyond the protecting reach of the hands of equity, and the present case fully illustrates that proposition.

These principles equitably and properly bar the applicant. The forest reserve policy is one of great public concern, so recognized by many acts of Congress and by repeated and great appropriations of public money and exchanges of millions of acres of choice public lands to effect as far as possible elimination of private holdings of land within the forest reserves. The *Jenkinses* were fully warned by the proclamation of March 2, 1898, that the United States had incorporated these with a large surrounding tract in one of its forest reserves, incurring in respect to it large expenditure of money for conservation of its forests and the water sheds of the streams. If they had right it was their duty with diligence to assert and perfect it. Their title was not cured and the right not one continuing indefinitely. The proclamation saved settlers' rights during "the statutory period within which to make entry or filing of record." Obviously the holder of a mere privilege like this is entitled to no more time to show intent to exercise it than is the settler who has attached himself to the soil, made improvements, expended his money and labor and made himself a home.

It is true the *Jenkinses* filed an application November 25, 1898, within three months from September 7, 1898, when the land was opened to entry, but that application was not pursued. Nothing more was done until January 5, 1904, over five years. A homestead claimant or proposed purchaser under the timber and stone act, a contestant and a selector under the act of June 4, 1897, are held barred by such delay. *Hattie E. Bradley* (34 L. D., 191); *Joshua L. Smith* (31 L. D., 57); *Emma H. Pike* (32 L. D., 395); *Zachary T. Hedges* (32 L. D., 520). No higher right or higher equity arises under the act of 1887.

In *Clogston v. Palmer* (32 L. D., 77, 83) it was held that:

The provisions of section 24 of the act of March 3, 1891, were not intended by Congress to authorize the President to extinguish the existing right to purchase conferred by section 5 of act of March 3, 1887, and that the proclamation of the President establishing the San Gabriel timber land reserve does not extinguish the applicant's right to purchase the land here involved.

The land therein involved was within the primary limits of the Southern Pacific branch line grant and indemnity limits of the At-

lantic and Pacific grant, restored to entry by instructions (26 L. D., 697), *supra*, and the application was presented December 1, 1898, within three months after September 7, 1898. This fact is not noted in that decision, and in view of such omission the decision is capable of too broad construction, though without error if that fact were noted. In so far as it may for such omission seem to be in conflict with the decision herein, based on the construction of the act of 1887 by the court in *Ramsey v. Tacoma Land Company*, *supra*, it will be construed in light of that decision.

Your decision is affirmed.

SOLDIERS' ADDITIONAL—MERGER OF RIGHT IN ENTRY—RECERTIFICATION.

F. W. McREYNOLDS.

By the allowance of entry upon a soldiers' additional location the additional right is merged in the land, and upon cancellation of the entry title to the right vests solely in the entryman or his assigns.

Where an entry allowed upon a soldiers' additional right was canceled, recertification of the right, even though otherwise proper, will not be made except upon satisfactory showing that no sale of the entry was made prior to cancellation, or if made that the right was reacquired and is vested in the person seeking recertification.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, August 7, 1908.* (E. F. B.)

This appeal is from the decision of your office of November 22, 1907, refusing to certify to appellant as assignee the soldiers' additional homestead right of Emily A. Barbour, widow of Beverly Barbour, deceased.

On June 20, 1875, Emily A. Barbour executed in Polk County, Missouri, the necessary papers for making entry of additional lands under said right and at the same time and place executed a power of attorney authorizing N. P. Chipman to locate for her and in her name any land she may be entitled to under said right, with full power to grant, bargain, and sell the lands located with such right upon such terms and for such price as to him may seem meet, and in her name to make and deliver good and sufficient deeds of conveyance for the same, and in consideration of the sum of \$100 paid to her by said attorney, she released unto him all claim to any of the proceeds of said sale.

Chipman made entry under said right of lands in California, which was canceled October 15, 1878, because of conflict with a valid cash entry and upon relinquishment filed by N. P. Chipman, as attorney in fact, who requested that the papers be returned to the local officers at Sacramento, California, *after being duly certified.*

No action appears to have been taken upon the application for certification of said right. By circular of February 13, 1883 (1 L. D., 654), the practice of certifying such rights was discontinued, with this provision, that the revocation of the rule shall not apply to cases then pending, or which were filed in your office prior to March 16, 1883.

This application was pending at the date of the issuing of said circular and comes within the provision above stated unless the application had been acted upon or sufficient proof in support of it had not been filed in your office prior to March 16, 1883, to authorize the certification of the entry upon said application.

In the Putman case (23 L. D., 152) and in the McDonald case (33 L. D., 647), cited in your decision, the applications had been rejected prior to March 16, 1883, and there was no application pending at that date. It was held that in view of the discontinuance of the practice of certifying such rights, a certificate of the right will not now be issued although the ground upon which the application was rejected may not have been well founded.

In McReynolds, assignee of Cornelius, decided October 4, 1907, the application was rejected because it did not appear that Chipman, under whom McReynolds claimed, had any interest in the right that he could assign. It was upon the same ground but a different state of facts that the application for certification was refused in McReynolds, assignee of Pollard, decided September 6, 1907, and upon motion for review, October 4, 1907.

In Mason, assignee of Buck, decided May 25, 1907, an incomplete application was filed March 15, 1883, for the purpose of saving rights under the circular, which was accompanied by a statement that "evidence to perfect the claim will be furnished hereafter." The soldier died nearly twelve years after, but in the meantime no evidence had been furnished nor had any steps been taken to perfect the application. In 1906 an application for certification of said right was filed by Mason as assignee. It was held that although the assignee might be entitled to all the legal and equitable rights of the soldier, he acquired no greater right. The filing of the formal application for certification prior to March 16, 1883, which was never acted upon, would not have entitled the soldier, who had slept on his rights for more than twenty years, to come in and complete said application.

In the case at bar the power of attorney given by Mrs. Barbour to Chipman recites that—

for and in consideration of the sum of one hundred dollars, good and lawful money, to me in hand paid by my said attorney, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, this power of attorney is made irrevocable, and I do hereby release unto my said attorney all my claim to any of the proceeds of any sale, lease, or contract that shall accrue by reason of the conveyance of the said premises,

This instrument operated as an absolute sale and assignment of the soldiers' additional homestead right, vesting in Chipman and his assigns whatever right, title, and interest the widow of the soldier may have possessed, with power to use the name of the assignor in the location of the right and the sale of the land located thereunder. Thereafter Mrs. Barbour had no right, title, or interest either in the additional right or the land (John M. Rankin, 30 L. D., 486).

By virtue of the interest acquired under such assignment, the soldiers' additional homestead right would pass to the assignee of Chipman or to anyone to whom he attempted to convey title to the land located thereunder.

In the case of McReynolds, assignee of Cornelius, above cited, Chipman, under a similar power, entered lands under the soldiers' additional right of Cornelius and sold the land to one Hayward, executing a deed in the name of Cornelius. With reference to this sale it was said:

By this deed Chipman conveyed the land entered in virtue of said right and as the right was then merged in the land his conveyance carried with it whatever title or interest Chipman had in the soldiers' additional right. The equitable title to the land subsequently came into the hands of the Sierra Lumber Company, when on September 29, 1885, it was canceled by your office for the reason that the entry papers were of doubtful execution, as the signature of Cornelius, the soldier, did not agree with the signature of Cornelius, the entryman.

McReynolds, who, on January 3, 1907, had procured an assignment of said right from Chipman, applied for certification. In affirming your decision refusing his application the Department said:

Whatever interest the purchaser of the land . . . may have in said additional right by reason of the cancellation made thereunder, it is evident that Chipman had no interest in such additional right on January 3, 1907, that he could assign to anyone, and hence appellant McReynolds acquired no right under his assignment from Chipman of such right on that date.

In this case there is no evidence of any sale of the land. Chipman could not convey a title, because the United States had no title that it could convey upon the location of the additional right, but any sale of the land that Chipman may have made vested in his assignee all rights growing out of the location of the scrip, and upon cancellation of the entry and failure of title, the authority to make entry under, or other use of such additional right vested solely in such vendee or his assigns.

The Department would not be justified in recognizing the right of Chipman to assign this right or make entry thereunder in the absence of a satisfactory showing that no such sale was made, or if made, that the right was reacquired by him.

With this exception the application for recertification appears to have been complete and had not been acted on at the date of McRey-

nolds' application to have it recertified to him. He may, however, be allowed to supply that proof, inasmuch as it does not appear to have been heretofore required as an essential requisite to the perfecting of his application for recertification.

Your decision is modified accordingly.

HEIRS OF EWING *v.* CAYTON.

Motion for review of departmental decision of June 3, 1908, 36 L. D., 474, denied by First Assistant Secretary Pierce, August 7, 1908.

ISOLATED TRACT—OKLAHOMA LAND—PUBLIC LAND STRIP.

FRANK MAPLE.

The provision in section 18 of the act of May 2, 1890, that all the land in the Public Land Strip shall be open for settlement under the homestead laws, in no wise affects the authority of the Commissioner of the General Land Office, under the provisions of section 2455, R. S., as amended by the acts of February 26, 1895, and June 27, 1906, to offer at public sale any isolated or disconnected tracts of such lands whenever in his judgment it would be proper to do so.

First Assistant Secretary Pierce to the Commissioner of the General
(W. C. P.) *Land Office, August 8, 1908.* (G. C. R.)

June 11, 1906, Frank Maple filed his application to purchase as an isolated or disconnected tract the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 25, T. 4 N., R. 25 E., Woodward, Oklahoma.

September 25, 1906, your office on consideration of said application directed publication of notice for the sale of the land as an "isolated or disconnected tract under the act of June 27, 1906" (34 Stat., 517), having found from the application that the land is nonmineral, chiefly valuable for grazing, unoccupied, and that the surrounding lands had been disposed of, etc., the register reporting the land "to have been isolated for more than three years."

Publication was duly made, fixing August 30, 1907, for sale of the land. On that date the land was sold to George H. Healy, the only bidder, and certificate duly issued. Thereafter, October 25, 1907, the purchaser sold and conveyed the land by warranty deed to Frank Maple, consideration one hundred and fifty dollars (\$150)—the purchase price at government sale.

November 20, 1907, you held that the sale was erroneously allowed for the reason that the land was open for entry under the act of May 2, 1890 (26 Stat., 81). You held the entry for cancellation and

directed that the applicant (Healy) be allowed sixty days to show cause why his entry should not be canceled.

Within the time allowed Maple, who had purchased from Healy, submitted evidence of said purchase, and contended that the land was properly disposed of under the act of 1906, *supra*.

Your office April 25, 1908, held that the entryman's contention could not be sustained, and again held the entry for cancellation subject to the right of appeal. Maple's further appeal brings the case here.

The 18th section of the act of May 2, 1890, *supra*, provides as follows:

All the lands embraced in that portion of the Territory of Oklahoma heretofore known as the Public Land Strip shall be open for settlement under the provisions of the homestead laws of the United States.

It is contended in the appeal that the act of February 26, 1895 (28 Stat., 687), amending section 2455, R. S., and the act of June 27, 1906, *supra*, superseded the act of 1890 above quoted, and that full authority is given in both acts to sell "any isolated or disconnected tract or parcel of the public domain less than one-quarter section."

The act of June 27, 1906, *supra*, reads as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell, at public auction, at the land office of the district in which the land is situated, for not less than \$1.25 per acre, any isolated or disconnected tract or parcel of the public domain not exceeding one-quarter section, which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That this act shall not defeat any vested right which has already attached under any pending entry or location.

It is deemed unnecessary to discuss the question raised in the appeal as to whether said act of 1906 supersedes the act of 1890 opening the land to settlement under the homestead law.

It is true that by the act of 1890 all the lands of the Public Land Strip were open to settlement under the homestead law. It does not necessarily follow, however, that isolated or disconnected tracts of less than 160 acres in said strip may not be sold when, in the "judgment" of your office, it would be proper to sell.

Lands may be so situated or of such character and condition from being rugged, broken and dry, that no thoughtful person would enter them with a view to farming or living thereon. When these tracts had been for years passed by as useless for a home, they are to all intents and purposes isolated and disconnected, and the statute (Section 2455, R. S., as amended by the act of February 26, 1895, *supra*, and the later act of 1906, *supra*) makes it lawful for the Commissioner of the General Land Office to order into market such tracts "which, in his judgment, it would be proper to expose to sale."

In the case of Edwin J. Miller (35 L. D., 411), your office, as in this case, directed that certain land be sold as isolated tracts. The land so offered was purchased by Miller. Afterwards, your office found that some of the land sold was within the twenty-mile limit of the Union Pacific Railroad and had been withdrawn for the benefit of said road; that the even-numbered sections so withdrawn were afterwards restored under the act of March 6, 1868 (15 Stat., 39), and made subject to entry under the pre-emption and homestead laws "only." For this reason your office held that Miller's entry, so far as it embraced land in an even-numbered section, should be canceled, since there was no authority to dispose of such lands except under the pre-emption or homestead laws.

On appeal, the Department said:

The distinct issue in this case is whether the act of March 6, 1868, and acts of similar character, directing that lands within certain limits shall be disposed of under one or more of the public land laws only, is a limitation upon the authority of the Commissioner of the General Land Office to offer at public sale any isolated or disconnected tract of public lands within those limits.

The Department in answering the question in the negative, says:

The purpose of the statute [Section 2455 as passed August 3, 1846] was to invest the Commissioner with authority to determine when a tract of public land is isolated or disconnected within the meaning of the statute, and should be offered for sale. His exercise of judgment and order of sale under the power and authority thus conferred has all the force of a proclamation by the President as to the particular land and takes it out of the operation of other general laws governing the disposal of the public lands. The statute establishes a complete system for the disposition of such lands and it can not be presumed that Congress intended by a subsequent statute embracing the same subject-matter to limit its operation by mere implication, if each statute can perform its distinct functions within the sphere designed by Congress without the interference of one with the provisions of the other.

It follows that notwithstanding the provisions of the act of 1890 that "all the lands" in the Public Land Strip shall be open to settlement under the homestead laws, isolated or disconnected tracts of less than 160 acres within that strip may be sold under the power given in section 2455, R. S., when in the judgment of your office it would be proper to do so.

The reason given for the adverse action taken not being tenable, the action appealed from is reversed.

If no reason appears other than that stated by your office, why the entry should be canceled, patent will issue under the certificate of purchase.

HOMESTEAD ENTRY—QUALIFICATION—OWNERSHIP OF LAND—UNDIVIDED INTEREST.**HEIRS OF DEWOLF v. MOORE.**

In estimating the acreage of an undivided fractional interest in real estate, for the purpose of determining a homestead applicant's proprietorship within the meaning of section 2289, R. S., as amended by section 5 of the act of March 3, 1891, he shall be charged with that portion of the total acreage of the land owned by him in common with others which is represented by the fractional extent of his undivided interest.

Acting Secretary Wilson to the Commissioner of the General Land
(W. C. P.) *Office, August 10, 1908.* (C. E. W.)

This is an appeal taken in behalf of the heirs of Dawn M. De Wolf from your office decision of February 21, 1908, affirming the action of the local officers and holding intact the homestead entry, No. 2565, of Nellie R. Baldock, formerly Moore, for the NE. $\frac{1}{4}$, Sec. 18, T. 2 S., R. 11 W., Lawton, Oklahoma.

This entry, initiated August 31, 1901, has been the subject of much controversy since September 11, 1902, when Dawn M. De Wolf filed her affidavit of contest charging that said entry was illegal because the defendant was, at the date of registration and entry, the owner of more than 160 acres of land, situate in Iowa and California.

The original hearing before the local officers resulted in a finding favorable to plaintiff. It was shown that defendant was the widow of J. C. Moore, who died November 21, 1900, at Rockford, Iowa, seized of 400 acres of land in said State, and, as it was found by the register and receiver, of 320 acres in California. By the terms of his will, the widow took one-third of all his property, after the payment of a certain legacy and of his indebtedness. The realty in Iowa was subsequently partitioned, 122 $\frac{1}{2}$ acres being set off to defendant. But there was no administration of the said estate in California and no partition thereof. The local officers charged the widow with an undivided one-third interest in the California lands and concluded that her entry aforesaid was illegal on account of the disqualification.

In the fall of 1904 you affirmed this action, subsequently denying a motion for review; whereupon she appealed to this Department. Under date of May 18, 1905, the Department decided that the evidence was insufficient to show that the J. C. Moore who owned the California lands was identified with the deceased husband of the defendant. The case was therefore remanded for rehearing. A motion for the review of this decision was filed by plaintiff and, December 28, 1905, the Department overruled the motion, holding that the fact that the family name and initials of the grantee of the California lands and of decedent were the same raised no presump-

tion of identity of person; or that to the fact that defendant's husband was domiciled in Rockford, Iowa, in 1896, no presumption attached that he lived in that place in 1888, the grantee of the California lands in the last-mentioned year being "J. C. Moore" of Rockford, Iowa. It was further held that even if there were identity of persons, there was no evidence establishing the fact that the California estate passed, as to any portion thereof, to the defendant free from any adverse claim thereto.

Later, in October, 1906, a further hearing was had and the parties appeared submitting additional proof. The local officers concluded that the new evidence did not change the result reached in the departmental decisions, and held that the contest should be dismissed. This is the action which your recent office decision affirmed.

The Department is unable to concur in your conclusion based on the findings of fact below. The evidence is very fully summarized in your decision and will not be amplified in this opinion. It now appears that J. C. Moore, husband of defendant, was domiciled in Rockford in 1888. It further appears from the testimony of his son that about that time J. C. Moore purchased a half section of land in Kings county, California, as well as five acres in Tulare County in said State, the deeds to which the witness had seen. He could not give the descriptions of the two tracts from memory, and it would be rather odd if he could. But he did know that his father was the owner of 320 acres in one county in California. Now the records of the two counties show that J. C. Moore did acquire by deed land answering the above description as to acreage. The records further show the lands to be free from mortgage or incumbrance of any sort and that taxes thereon had been paid up to and including the year 1902-3.

The evidence is amply sufficient now to demonstrate that defendant's husband, at the time of his death, was possessed of 320 acres of land in California free from incumbrance of any sort, and that under his will she took an undivided one-third interest in this property; the extent of her interest under the will would be exactly the same as it would have been under the Civil Code of California had he died intestate—an undivided one-third in fee.

Defendant has never asserted her claim to this land nor has there been any effort, by partition suit or otherwise, to assign any exact portion of the whole to her individually. Nevertheless the fact remains that immediately upon her husband's death, she became vested in fee simple with an interest amounting to one third of the acreage of decedent's estate in California.

The interest, to be sure, is a tenancy in common with other heirs of the decedent, but she is severally seized of her share which at any time can be reduced to a delimited portion of the whole tract or conveyed to another person. It is such an interest in land as might, under the

provisions of section 2260 of the Revised Statutes, disqualify the owner and occupant from entering land under the pre-emption law. See *Richards v. Ward*, 9 L. D., 605.

But, it may be urged, an undivided fractional interest does not necessarily imply that upon partition exactly that fractional part of the whole acreage would be set off to the defendant. It might be that of 320 acres of land the major portion of which is worthless, 20, 30, or 40 acres of good land on partition would be the equivalent of one-third of the value of the entire tract. Hence it by no means follows that an undivided one-third interest in 320 acres would mean, upon division of the estate, the setting off of 106 $\frac{2}{3}$ acres to defendant.

While this may be, only actual partition of the estate can demonstrate that the several interests in acreage is less than the fraction indicates. The Department therefore holds that in estimating the acreage of an entryman's proprietorship in real estate, within the meaning of the 5th section of the act of March 3, 1891 (26 Stat., 1097), he shall be charged with that proportion of the total acreage of a tract owned by him in common with others which is represented by the fractional extent of his undivided interest. No other rule can well obtain until, of course, there has been partition of the estate.

It is therefore concluded that defendant, in addition to the 122 $\frac{1}{2}$ acres owned by her in Iowa, was, at the time of her entry aforesaid, also the proprietor of one-third of 325 acres in California (108 $\frac{1}{3}$ acres), making in all over 230 acres and consequently disqualifying her, under section 5 of the act of March 3, 1891, *supra*, as an entryman.

Your decision is therefore reversed and the entry will be canceled.

SOLDIERS' ADDITIONAL-SUBSTITUTION-WITHDRAWAL FOR FORESTRY PURPOSES.

FLORENCE A. COFFIN.

The Commissioner of the General Land Office has full power in an *ex parte* proceeding to review, on his own motion, any former action by him respecting the disposal of public lands, and to correct any former errors respecting their entry, so long as the title remains in the United States.

Where a soldiers' additional location is relinquished as to a portion of the land embraced therein, because of insufficiency of the base offered, substitution of other base for such relinquished portion, as of the date of the original application, can not be allowed in the face of an intervening withdrawal for forestry purposes.

Acting Secretary Wilson to the Commissioner of the General Land
(W. C. P.) *Office, August 13, 1908.* (J. R. W.)

Florence A. Coffin appealed from your decision of June 17, 1908, holding for cancellation her entry under section 2306 of the Revised Statutes as to lot 3, Sec. 17, T. 67 N., R. 15 W., Duluth, Minnesota.

December 22, 1904, Coffin applied to enter this tract and other land as assignee of a valid right under Revised Statutes 2306 of one Brooke, of insufficient area to cover both tracts. July 22, 1905, you required her to eliminate one tract. The lot here in question was relinquished by her October 25, 1905. Entry was allowed as to the other land and was carried to patent.

August 18, 1905, all of township 67 north, range 15 west, was temporarily withdrawn from entry with view to inclusion in a forest reserve. October 24, 1905, simultaneously with her relinquishment, mentioned, Coffin applied, as assignee of Jonathan Wood under Revised Statutes 2306, to enter said lot 3 and two other tracts, and to substitute this, to have effect as from date of her application as assignee of Brooke. November 25, 1907, upon theory that substitution was permissible, you allowed the application. December 2, 1907, the local office allowed the entry and issued final certificate. June 17, 1908, of your own motion, you reviewed your former action and held:

The action of the office in allowing said entry, as to lot 3, was erroneous, as substitution was absolutely inhibited by the intervening withdrawal thereof for forestry purposes, and for that reason the application of Coffin, as assignee of Wood, should not have been considered as of the date of her original application as assignee of Brooke. Blair Burwell (35 L. D., 184). The entry as to lot 3 is held for cancellation.

Appellant assigns for error that: 1. Your action of November 25, 1907, rendered the application a right adjudicated. 2. Allowance of the entry was merely substitution of consideration and completion of a valid entry. 3. It is contrary to certain departmental decision, hereinafter noted.

The first assignment deserves small consideration. It is always within the power of the land department, as of other administrative officers, so long as title remains in the United States, to review any former action respecting disposal of public lands, and to correct any former errors respecting their entry. In *Knight v. U. S. Land Association* (142 U. S., 161, 178) the court held:

If, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly-discovered fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney-General to take measures to annul.

That power here referred to as resting in the Secretary of the Interior necessarily rests in that officer who, in practice and organization of the land department, represents and acts for him in final disposal of public land. Where, as in this case, in absence of any

adversary party to bring the case up from your office by appeal, it was within your proper powers to reconsider and annul your action intended to be final, when an error in procedure was discovered. No wrong is thereby done or any lawfully vested right anywise affected, as the party claiming to be aggrieved may appeal for review of such action, as in fact he has done.

By the first application Coffin attempted to appropriate more public land than the right she then surrendered entitled her to claim. You detected and pointed out that inherent vice invalidating it and rendering it impossible to be approved. Had this vice in her application been a premeditated fraud, she was entitled to no grace, and the proper course was to reject it altogether. Being satisfied this defect was of mistake rather than fraud, you held it for rejection, with leave to cure by elimination of part of the land. She cured her application by eliminating the excess, relinquished it to the United States, and as to the residue her application was allowed, entry made, and patent issued. That transaction was so closed, and nothing more respecting it remained to be done.

Before the new application of October 24, 1905, was filed, the forestry withdrawal intervened. To that time the Government had received no consideration for lot 3, and Coffin had no equitable claim to it.

Your decision is not in conflict with *Wright v. Francis* (36 L. D., 499), June 6, 1908, nor with *George E. Lemmon*, assignee of *Jones* (36 L. D., 543), June 25, 1908, as contended. In the former case there was a meritorious right to entry, existing prior to the entry itself. In attempting to exercise his preference right, the former contestant made four entries for the several subdivisions, offering five soldiers' additional rights, aggregating 129.20 acres, only 120.07 of which were valid. Before his application to substitute new valid rights to make the consideration sufficient, Francis and Sweitzer applied for entries. It was held to be equitably due Wright to permit him to make the consideration sufficient for protection of an antecedent meritorious right, which he in good faith endeavored to exercise. There was no relinquishment of former claim, merely a continuous, consistent pursuit of a prior right made in clear good faith. It was an ordinary case of amendment by substitution for a consideration insufficient and in part bad. This practice of permitting amendment in conservation of a prior right is well founded in equitable principle, long recognized by the land department.

The other case cited (*George E. Lemmon*) was uncomplicated by any claim of intervening adverse right. It was found that the consideration offered was insufficient, and, instead of rejecting his application, he was permitted to make the consideration good. It has no relation

to or bearing upon the present case, wherein Coffin elected to relinquish lot 3 from her first application and a withdrawal had intervened before she had any equity.

The present case is clearly within the rule in *Blair Burwell, supra*, cited by you. It is governed thereby.

August 8, 1908, the Department rendered a decision herein wherein some facts in the case were erroneously recited, due to an incomplete record transmitted by your office. Such errors do not affect the result then reached but to conform the statements of fact with the record said decision, not promulgated, is recalled and vacated.

Your decision is affirmed.

STATE OF CALIFORNIA.

Motion for review of departmental decision of May 20, 1908, 36 L. D., 432, denied by Acting Secretary Wilson, August 15, 1908.

VACATION OF PATENT—RESTORATION OF LAND.

GUNDERSON *v.* NORTHERN PACIFIC RY. CO.

The final decree of a court vacating a patent operates to revert title in the United States, but the land does not again become subject to appropriation until restored to entry by the land department, and no rights are acquired by the presentation of an application therefor prior to such restoration.

Acting Secretary Wilson to the Commissioner of the General Land
(W. C. P.) *Office, August 19, 1908.* (E. O. P.)

The Northern Pacific Railway Company has appealed to the Department from your office decision of January 15, 1908, rejecting its application to select the SE. $\frac{1}{4}$, Sec. 14, T. 149 N., R. 57 W., Devils Lake land district, North Dakota, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), and directing the allowance of the homestead application of Melvin A. Gunderson for the same tract.

The land in question was originally entered as a homestead by one John M. Holland and patent therefor issued to his heirs December 17, 1900. Suit to set aside said patent was instituted by the United States and successfully prosecuted to decree vacating the patent and quieting the title in the United States. Said decree was entered May 25, 1907. The railway company, May 28 following, presented the application held for rejection by your office. The local officers report that they rejected said application the same day it was presented but that owing to stress of other business notice of their action was not written until June 24, 1907. June 26, 1907, the entry of Holland was

by direction of your office canceled upon the records of the local office, and on that day Gunderson filed his application to make homestead entry of the land.

It is observed that at the time the company's selection was tendered the entry of Holland still remained of record in the local office though the decree of the court cancelling the patent issued thereon had been rendered and the local officers had notice thereof. Counsel while admitting the existence of the settled rule that no rights can be initiated by the filing of an application to enter or select land covered by an entry of record, contend that the decree of the court of its own force operated to clear the record and that no further action by the land department was necessary, and that the tract in question thereafter became subject to entry by the first legal applicant.

This position is not warranted by any of the decisions of the Department and is contrary to the well-settled practice obtaining in analogous cases. Though the decree of the court operated to revest the title in the United States, it still remained for the land department to restore the land to entry by taking such steps, in conformity with the decree, as would clear its records of the entry on which the patent vacated by the court was based. The local officers very properly declined to take these steps until directed by your office and the selection of the company tendered before the land was restored to entry was properly rejected. The rule of administration adopted in similar cases has the sanction of the courts and the Department is of opinion the case under consideration falls within it. (*Holt v. Murphy*, 207 U. S., 407, 415.)

It is urged that the local officers did not, as reported by them, reject the selection immediately but deferred action until after the land had been restored to entry. Even though this could be established it would be immaterial as the company is entitled to a decision only upon the facts as they existed at the date the selection was tendered and as before stated the land was not then subject to selection by it. (*Eaton et al. v. Northern Pacific Ry. Co.*, 33 L. D., 426, 432, and cases cited.)

The decision of your office is hereby affirmed.

SOLDIERS' ADDITIONAL—POWER OF ATTORNEY—TRANSFER OF RIGHT

D. N. CLARK.

A mere power of attorney to locate a soldiers' additional right and to sell the land located therewith does not invest the attorney in fact with any right except as agent for his principal, and the death of the soldier prior to location of the right under such powers constitutes a revocation thereof and the right remains an asset of his estate.

Where, however, the soldier disclaims all right to, or interest in the proceeds of the sale under the power, in consideration of a cash payment, he thereby divests himself of all his right, title and interest and vests the same in his assignee with power to sell and assign the right.

Acting Secretary Wilson to the Commissioner of the General Land
(W. C. P.) *Office, August 20, 1908.* (E. F. B.)

With your letter of August 12, 1908, you transmit, upon the appeal of D. N. Clark, the record in the matter of his application for recertification to him, as assignee, the soldiers' additional homestead right of William M. Stokes.

Appellant claims title to said right by purchase, December, 1906, from the administrator of the estate of Stokes, who died January 18, 1904, the right having been certified to Stokes while in life.

Clark, as assignee, applied for reissue and recertification of said right, claiming that the certificate had been lost or destroyed. His application was rejected for the reason that the certificate was then in the files of your office, with the application for recertification of R. H. Peale, who claimed by mesne transfers under an assignment made by Stokes while in life. From that decision Clark did not appeal. He then filed a protest against the recertification of said right to Peale, which was dismissed and the additional right was recertified to Peale May 16, 1908, the certificate being in possession of Peale and his application showing *prima facie* a right to the same.

It is claimed in behalf of Peale that his title to the soldiers' additional homestead right of Stokes had its origin in an assignment by Stokes of said right by means of powers of attorney to locate the same and to sell the land located therewith with power of substitution.

A mere power of attorney to locate an additional right and to sell the land located therewith does not invest the attorney in fact with any right except as agent for his principal, and if the soldier dies before the location of the right under such powers they would be revoked by the death of the soldier and the right would remain as an asset of his estate.

If, however, there is a disclaimer by the maker of the power of all right to, or interest in the proceeds of the sale, in consideration of a cash payment to the soldier, as in the case of John M. Rankin (30 L. D., 486), it is a sale and assignment of the right which divests the soldier of all his right, title, and interest and vests the same in his assignee with power to sell and assign the right to others.

As there is no restraint upon the power of alienation by the soldier of such additional right, he may convey the same, and if he does in fact sell his right and receive a consideration therefor the administrator of his estate can convey no title to the same, although the pur-

chaser of the right assumed to locate it under powers as attorney for the soldier.

The facts in this case are not clearly shown, but as your office has determined that Peale has submitted sufficient proof of ownership under a sale of the certificate made by Stokes while in life and the right having been recertified to Peale who has possession of the original certificate, your decision dismissing the protest of appellant is affirmed, it not being shown that the estate of Stokes had any title or interest in said additional right.

PALATKA SCRIP—LOCATABLE ONLY ON SURVEYED LAND.

STATE OF FLORIDA *v.* SANTA FE PACIFIC R. R. Co.

Palatka scrip may be located only upon surveyed land.

Land is not regarded as surveyed for the purpose of disposition until the plat of survey has been officially filed in the local office, after notice, as provided by instructions of October 21, 1885.

No rights are acquired by the presentation of an application prior to the date of the official filing of the plat of survey in the local office.

Acting Secretary Wilson to the Commissioner of the General Land
(W. C. P.) *Office, August 22, 1908.* (J. R. W.)

W. W. Clyett, agent for the State of Florida, appealed from your decision of February 10, 1908, rejecting his application to locate Palatka scrip on lots 1, 2, 3, and 4, Sec. 35, T. 42 S., R. 20 E., Gainesville, Florida.

The land is part of Gasparilla Island, between Charlotte Harbor and the Gulf of Mexico, surveyed in the field during February and March, 1907, plat of which survey was approved by you April 12, 1907, and transmitted to the local office to be officially filed June 20, 1907.

June 14, 1907, Clyett, as agent for the State, applied to locate Palatka scrip on lots 2, 3, and 4 and June 19 to locate like scrip on lot 1. These the local office rejected as to the applications of June 14; denied motion for review, and Clyett appealed.

June 20, 1907, three homestead applications were filed for sundry of the lots, together including all of them. James M. Gifford, attorney in fact for the Santa Fe Pacific railroad, also applied to select all the lots under the act of June 4, 1897 (30 Stat., 36), in lieu of land surrendered to the United States in the San Francisco Mountains Forest Reserve, Arizona. None of the three homestead applicants alleged prior settlement. The local office put up the lots for disposal as in case of simultaneous applications and awarded the right of entry to Gifford upon his bids aggregating \$509.76 for preference

right of entry. You held that "The plat of survey was not officially filed . . . until June 20, 1907, and until that time the lands were, so far as being subject to disposal as public lands, unsurveyed," and affirmed the rejection of the Palatka scrip locations.

Clyett by his appeal contends that it is immaterial whether the land be regarded as surveyed or unsurveyed on June 14 and 19, when his applications were filed and argues—

If the lots in controversy were on June 14, 1907, "vacant and unappropriated lands of the United States in Florida" they were subject to location whether surveyed or unsurveyed. Congress put no conditions except the fact that they were vacant and unappropriated.

The act under which this scrip was issued to the State and was by the State sold with power delegated by the State to its vendee to locate it, authorized selection of—

an equal quantity of land from any of the vacant and unappropriated public lands of the United States in Florida and patents shall be issued to the State for the land so selected.

Public land can be disposed of only after survey. By express acts of Congress in certain cases rights to enter lands may be located in advance of surveys but such locations necessarily remain unexecuted by patent until the lands are identified by survey and proper descriptions can be given. Such locations in advance of surveys must be made to conform to survey lines when made. But except by special authority of Congress no rights are or can be recognized by the land department to arise from attempted scrip locations in advance of surveys. There was in the act no authority express or necessarily implied to make location of the Palatka scrip on unsurveyed lands and it necessarily follows that the words "vacant and unappropriated lands" must be read in the light of the general legislation of Congress and means only surveyed lands subject to disposal by other ordinary forms of entry.

Under section 441, Revised Statutes, the Secretary of the Interior is made head of the land department and charged with supervision of public business relating to public lands. By section 453, under his direction, the Commissioner of the General Land Office is charged with—

all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands . . . and the issuing of patents for all grants of land under the authority of the Government.

Section 161 (R. S., U. S.) provides that—

The head of each Department is authorized to prescribe rules and regulations, not inconsistent with law, for the government of his Department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

In *Knight v. U. S. Land Association* (142 U. S., 161, 178), the court, referring to these sections, said:

The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt.

The test of validity of an executive regulation is thus stated by the court in *Boske v. Comingore* (177 U. S., 459, 470):

In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

The imposing of a thirty-day notice to the public between approval of the plat of survey and the opening of land to entry is purely an administrative regulation, not authorized in express terms by any statute. It is a regulation intended to assure equality of opportunity to all desiring to be purchasers, and originated October 21, 1885 (4 L. D., 202). The working of this regulation has been found salutary, assuring equality of opportunity to all. The regulation has now stood nearly a quarter of a century, during which Congress has not legislated to annul it or show its disapprobation of it. The Department has no doubt of the Secretary's power to establish it and will not disregard or recede from a rule that has proved so just, salutary, and satisfactory in its operation.

Appellant might with other applicants have attended the opening and bid like the rest for the preference right of entry. He chose not to do so, but stood upon his supposed rights under the applications made before the land had been opened to entry. Under them he got no right. *State of California v. Koontz* (33 L. D., 643, 645).

Your decision is affirmed.

**ADDITIONAL HOMESTEAD—COMPLETION OF ORIGINAL ENTRY—
SECTION 2, ACT OF APRIL 28, 1904.**

CHARLES I. RAFTER.

The act of April 28, 1904, does not require that the right of additional entry accorded by section 2 thereof shall be exercised prior to completion of title to the original entry, and the fact that the original entry was commuted prior to the filing of the additional application in no wise affects the additional right, provided the applicant at that time continues to own and occupy the original tract.

Acting Secretary Wilson to the Commissioner of the General Land
(F. W. C.) *Office, August 26, 1908.* (P. E. W.)

August 25, 1905, Charles I. Rafter made homestead entry No. 2168, Rosebud series, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 23, T. 96 N., R. 72 W., Mitchell, South Dakota, on which he thereafter submitted commutation proof, receiving cash certificate No. 1030 on January 16, 1907, and patent on June 29, 1907.

August 23, 1907, under section 2, act of April 28, 1904 (33 Stat., 527), he made homestead entry, No. 2708, for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of the same section, alleging that at date of this second entry he still owned and resided upon the land embraced in his original entry, No. 2168.

December 3, 1907, your office held said homestead entry No. 2708 for cancellation, as improperly allowed, for the reason that section 3 of the act named forbids the acquisition of title to lands entered under said act through commutation under the provisions of section 2301, Revised Statutes, and it follows that additional entries cannot be made under section 2 of that act by persons who have, prior to their applications to make such additional entries, commuted their original entries, citing the circular of July 27, 1907.

The entryman was allowed sixty days to furnish notice of his election to hold his homestead entry No. 2708, under the provisions of section 6, act of March 2, 1889 (25 Stat., 854), and of his intention to comply with the homestead law as to the land now sought, through the proper period of residence and cultivation, failing of which, or to appeal, said entry will be canceled.

Rafter has appealed to the Department.

Section 2 of the act of April 28, 1904, *supra*, permits one who made homestead entry for less than one-quarter section of land and still resides upon and owns the original tract, to enter other and additional contiguous land to make not over 160 acres in the aggregate, "without proof of residence upon and cultivation of the additional entry," and there is no requirement that the additional entry shall be made prior to the acquisition, in any manner, of title to the land first entered. It is only provided that title to the additional tract shall not be acquired by commutation. It is only necessary, therefore, that the entryman shall continue for five years to reside upon and cultivate the land taken under both entries, and this he may do after commutation of the original entry. The law requires continued ownership of the original tract, and residence thereon to date of the additional entry, and five years compliance with the law before issue of patent for the additional tract. See the case of Almon B. Harris (36 L. D., 402).

The additional entry will accordingly be held intact subject to proof, on due notice, of compliance with the law as to residence and cultivation, your said decision being hereby reversed.

OPENING OF ROSEBUD INDIAN LANDS IN SOUTH DAKOTA (TRIPP COUNTY).

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

WHEREAS by the act approved March 2, 1907 (34 Stat., 1230), the Congress directed that all that part of the Rosebud Indian Reservation lying south of the Big White River, and east of range 25 west, of the sixth principal meridian, except all sections 16 and 36, which were granted to the State of South Dakota, and excepting also such parts thereof as have been or shall hereafter be either allotted to Indians, selected by said State, or reserved for town-site purposes, be disposed of under the general provisions of the homestead laws of the United States, and be opened to settlement, entry, and occupation only in such manner as the President might prescribe by proclamation;

Now, therefore, I, Theodore Roosevelt, President of the United States, by virtue of the power and authority vested in me by said act of Congress, do hereby prescribe, proclaim, and make known that all of said lands which shall remain unallotted to Indians, unselected by said State, and unreserved for town sites, on the first day of March, A. D. 1909, will be opened to settlement and entry under the general provisions of the homestead laws and of said act of Congress, in the manner herein prescribed, as follows, and not otherwise:

1. Any person who is qualified to make a homestead entry may, between 9 o'clock a. m., on Monday, October 5, and 4.30 o'clock p. m., on Saturday, October 17, 1908, and not thereafter, present to James W. Witten, Superintendent of the Opening, or to some person acting for him, at either the town of Dallas or the town of Gregory, in Gregory county, South Dakota, either by ordinary mail or otherwise, but not by registered mail, a sealed envelope which bears no distinctive marks indicating the name of the applicant, and which contains his application for registration, hereinafter prescribed.

2. All applications for registration must be made on forms prescribed and furnished by the General Land Office, and must show that the applicant is qualified to make homestead entry, and state his age, height, weight, and post-office address, and be sworn to at one of the following-named towns: Chamberlain, Dallas, Gregory, or Presho, in the State of South Dakota, or O'Neill or Valentine, in the State of Nebraska, before a United States commissioner, judge or clerk of a court of record, or a notary public, authorized, under the laws of said States, to administer oaths in said towns.

3. Any person filing more than one affidavit, or in any other than his true name, shall be denied the privilege he might have otherwise secured, under this drawing, except that any honorably discharged

soldier or sailor entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of March 1, 1901 (31 Stat., 847), may be represented by an agent of his own selection for the purpose of executing and presenting his application for registration, due authority therefor being shown, but no person shall be permitted to act as agent for more than one such soldier or sailor, and the agents of all soldiers and sailors must execute the affidavits required of them at one of the towns named above, and present the same in the same manner in which persons who are not soldiers are required to present their applications.

Envelopes showing on the outside distinctive marks of any character indicating the name of the person whose application is inclosed therein, shall be eliminated from the drawing.

4. Beginning at 10 a. m. on October 19, 1908, and continuing thereafter as long as may be necessary, there shall be impartially taken and drawn from the whole number of envelopes so presented such number of them as may be necessary to carry into effect the provisions of this proclamation; and the applications for registration contained in the envelopes so drawn shall, when they are correct in form and execution, be numbered serially in the order in which they are drawn, and the number thus assigned shall fix and control the order in which applications to enter may be presented, after the lands shall become subject to entry.

5. Immediately after the drawing a list of the successful applicants, showing the number assigned to each of them, will be conspicuously posted at the place of registration and furnished to the press for publication as a matter of news, and a notice will be promptly mailed to each person whose name is drawn and numbered, informing him of the number assigned to him, and of the date on which he must apply to enter, and later he will, in due time, be furnished with a copy of the regulations controlling the method of entry, and be supplied with a map showing the lands subject to entry. The notice will be mailed to the post-office address given by the applicant in his application for registration, except in cases where the applicant requests otherwise, and any applicant who changes his post-office address before November 1, 1908, should at once inform the Superintendent of the Opening of the change.

6. Commencing at 9 a. m. on March 1, 1909, and continuing thereafter on such dates as may be fixed by the Secretary of the Interior, persons holding numbers assigned to them under this proclamation will be permitted to present their applications to enter (or their declaratory statements, in cases where the applicant is entitled to make entry as a former soldier), in the order in which their applications for registration were drawn and numbered.

7. If any person fails to apply to enter or to file a declaratory statement, if he is entitled to do so as a former soldier, on the day assigned to him for that purpose, or if he presents more than one application for registration, or presents an application in any other than his true name, he will forfeit his right to enter any of said lands prior to September 1, 1909.

8. None of these lands shall become subject to settlement or entry prior to September 1, 1909, except in the manner prescribed herein, and all persons are admonished not to make any settlement prior to that date, on any lands not covered by entries made by them under this proclamation.

9. The Secretary of the Interior shall make and publish such rules and regulations as may be necessary and proper to carry into full force and effect the manner of settlement, occupation, and entry as herein provided for, and he shall, prior to the first day of March, reserve from said lands such tracts for town-site purposes as, in his opinion, may be required for the future public interests.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 24th day of August, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.]

THEODORE ROOSEVELT.

By the President:

ALVEY A. ADEE,

Acting Secretary of State.

OPENING OF ROSEBUD INDIAN LANDS IN SOUTH DAKOTA (TRIPP COUNTY).

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., August 25, 1908.

The Commissioner of the General Land Office.

SIR: Pursuant to the proclamation of the President issued August 24, 1908, for the opening to settlement, occupation, and entry of certain lands formerly within the Rosebud Indian Reservation in the State of South Dakota, under the act of Congress approved March 2, 1907 (34 Stat., 1230), and the general provisions of the homestead laws, the following rules and regulations are issued:

1. *Applications for registration.*—Any person qualified and desiring to make entry of any of said lands may, either through the mails or otherwise, but not by registered mail, deliver to James W. Witten, Superintendent of the Opening, at either the town of Dallas or the

town of Gregory, in the State of South Dakota, a sealed envelope containing his sworn application for registration, showing his age, height, weight, and post-office address, and his qualifications to make entry under the homestead laws.

2. The applications specified in the preceding paragraph must be on forms similar to those attached hereto, and furnished by the General Land Office, and they must be sworn to before a United States commissioner, judge or clerk of a court of record, or a notary public, in one of the following-named towns, to wit: Chamberlain, Dallas, Gregory, or Presho, in the State of South Dakota, or O'Neill or Valentine, in the State of Nebraska, and not elsewhere.

3. No person is authorized to present more than one application of the character mentioned above in his own behalf, nor in any other than his true name, or on behalf of any other person except as herein provided, and if more than one application is presented by any person in violation hereof he will be deemed to have waived and forfeited the right to have either or any of his applications considered, and they will not be considered, but any honorably discharged soldier or sailor entitled to the benefits of section 2304 of the Revised Statutes of the United States, as amended by the act of March 1, 1901 (31 Stat., 847), may be represented by an agent of his own selection for the purpose of executing and presenting the application above provided for, due authority therefor, upon a form provided by the Commissioner of the General Land Office, being inclosed in the envelope with the application. No person will, however, be permitted to act as agent for more than one such soldier or sailor.

4. No application for registration will be received or considered if it is presented to or reaches the Superintendent of the Opening before 9 o'clock a. m. on Monday, October 5, 1908, or after 4.30 o'clock p. m. on Saturday, October 17, 1908, nor will any application which is not sworn to in one of the above-mentioned towns be considered.

All envelopes containing applications for registration should be plainly addressed to "James W. Witten, Superintendent of Opening," at Dallas or Gregory, South Dakota. No application will be considered which is received by *registered* mail, or received in an envelope which bears any mark that in any way indicates the person who makes the application. No envelope should contain more than one application for registration, or contain any other paper than the application, except that the agent's authority to represent a soldier, as provided in paragraph 3, must accompany the soldier's application for registration, when it is filed by the agent. Proof of naturalization and of military service, and other proof required, as in case of second homestead entries, will be exacted before the entry is allowed, but they should not accompany the application for registration.

Blank forms of applications and envelopes desired by persons registering for themselves, will be furnished through the officer before whom the application is sworn to, but soldiers should write to "James W. Witten, Superintendent of Opening, General Land Office, Washington, D. C.," prior to September 25, 1908, or apply to him at Gregory or Dallas, South Dakota, after that date, for blank forms for appointment of agents.

5. *Method of receiving and handling applications.*—The Superintendent of the Opening will provide himself with a strong box or boxes, securely closed, fastened, and sealed in such a manner that they can not be opened and closed again without leaving evidence thereof. These boxes must be so constructed that the applications may be deposited therein but can not be extracted therefrom before the time fixed for their opening, without detection.

6. As soon as any envelope, properly indorsed as herein provided, has been received by the Superintendent of the Opening, it will be deposited in one of the boxes, which will be guarded by the representatives of the Government until the boxes are publicly opened, as hereinafter provided.

7. Beginning on Monday, October 19, 1908, at 10 o'clock a. m., the Superintendent of the Opening will, under the supervision and with the assistance of such persons as may be designated for that purpose, publicly open the box or boxes, and thoroughly mix all of the envelopes deposited therein, and after they have been so mixed envelopes will be drawn, one at a time, until six thousand of them, containing applications correct in form and execution, but no more, have been drawn, and as fast as they are drawn the envelopes will be publicly opened in the order in which they were drawn, and a distinctive serial number, beginning with number one, will be placed on each application contained in such envelopes, corresponding with the order in which the envelopes were drawn, and the numbers thus given will control the order in which the qualified persons named therein will be permitted to make entry. All applications contained in envelopes opened, as above provided, which are not correct in form and execution, will be stamped "Rejected—Imperfectly Executed," and filed in the order in which they were opened.

8. As soon as an application, correct in form and execution, has been drawn and numbered, as prescribed above, the name and address of the person who executed it, and the number indorsed thereon, will be publicly announced and recorded in a book to be known as "List of Authorized Applicants for Rosebud Lands, 1908," and copies of such list will be subsequently posted at the place where the drawing is held, and furnished to the press for publication as a matter of news.

9. All envelopes in excess of those drawn and numbered, as above directed, will be opened and the applications therein will be scru-

tinized for the purpose of determining whether any person who has drawn a number entitling him to make entry has presented more than one application, and if it is discovered that any such person has presented more than one application, or presented it otherwise than as provided herein, his name will not be retained upon the list of authorized applicants and he will be denied the privilege of entry he might otherwise have received under this drawing.

10. Notice will be promptly mailed to each person whose name appears on the list of authorized applicants, giving him the number assigned to him, and advising him that he will later receive notice of the time and place upon which he will be permitted to appear and make entry. These notices will be mailed to the addresses given by applicants for registration, unless other addresses are later given. Each person who deposits an envelope should, however, in his own behalf, employ such means as will insure his prompt and accurate information through newspaper reports of the successful applicants, or otherwise, as to the number assigned him, as the notice may possibly miscarry in the mail, and all persons applying to register who change their post-office addresses prior to November 1, 1908, should notify the Superintendent of the Opening, at Washington, D. C., of that fact, and give him their new addresses.

11. *Method of making entry.*—Persons who have been assigned numbers which entitle them to make entry may present their applications and make entry at the place designated in the notice given them, as follows: Commencing on Monday, March 1, 1909, the applications of those persons who have been assigned numbers 1 to 50, inclusive, must be presented in person (in cases of soldiers and sailors, in the manner permitted by section 2309 of the Revised Statutes of the United States), and such applications will be considered in their numerical order during that day, and the applications of those who have been assigned numbers 51 to 125, inclusive, must be presented and will be considered in their numerical order during the next day, and the applications of those who have been assigned numbers 126 to 200, inclusive, must be presented and will be considered in their numerical order during the next day, and the applications of those who have been assigned numbers 201 to 300, inclusive, will be presented and considered in numerical order on the next day, and the applications of those who have been assigned numbers 301 to 400 must be presented and will be considered in their numerical order during the next day, and so on, Sundays and legal holidays excepted, until 1,500 persons have been given an opportunity to make entry, after which the applications of those holding numbers from 1,501 to 1,625, inclusive, must be presented and will be considered in their numerical order during the next day, and so on, at the rate of 125 a day, until 2,500 persons have been given an opportunity to make

entry, after which the applications of 150 persons may be presented and will be considered on each succeeding day, until 4,000 persons have been given the privilege of making entry. No further applications to enter will be received or considered until August 2, 1909, after which applications to enter may be presented in their numerical order by those who hold numbers above 4,000, at the rate of 100 for each day, Sundays excepted.

12. If any person who has been assigned a number entitling him to make entry fails to appear and present his application for entry, when the number assigned him by the drawing is reached, his right to enter will be passed until after all other applicants assigned for that day have been disposed of, when he will be given another opportunity to make entry on that day, failing in which he will be deemed to have abandoned his right to make entry prior to September 1, 1909.

13. At the time of appearing to make entry each applicant must furnish such affidavits as may be required to identify himself as being the person who executed the application upon which his number was assigned, and he must, by affidavit, show his qualifications to make a homestead entry. If an applicant files a soldier's declaratory statement, either in person or by agent, he must furnish evidence of his military service and honorable discharge. All foreign-born persons must furnish proper evidence that they have either filed their declarations of intention to become citizens, or that they have been fully naturalized, and all persons applying to make second entries must furnish the number and date of their former homestead entry and a description of the land entered, and also present an affidavit, corroborated by the oaths of two other persons, showing facts which entitle them to make entry. This affidavit must conform to the general regulations governing applications for second entries in force at the time the application is presented.

14. *Payments required.*—All persons who enter these lands will be required to pay the usual fees and commissions collected under the homestead laws where the price of the land is \$1.25 per acre, and, in addition thereto, all persons who make entries prior to June 1, 1909, must pay as the purchase price of said lands \$6 per acre, and those who make entry between May 30 and September 1, 1909, must pay \$4.50 for each acre embraced in their entries, as follows: One-fifth to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in one, two, three, four, and five years, respectively, from and after the date of entry, and in cases where entries are commuted under section 2301 of the Revised Statutes of the United States the entryman must pay all the deferred and unpaid installments of the purchase price at the time he makes proof of actual residence and cultivation for the full period of fourteen months. All persons who make entry after August 31, 1909, will be

required to pay \$2.50 per acre, in the same manner and upon the same conditions mentioned above.

15. In case any entryman fails to make the annual payments, or any of them, promptly when due, or fails to comply with the requirements of the homestead law, all rights in and to the lands covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled and the lands reoffered for sale and entry under the provisions of the homestead law, at the same price that it was first entered.

16. All of the lands affected by these regulations which have not been entered, as herein provided, prior to September 1, 1909, will, on that date, but not before, become subject to settlement and entry by any qualified homesteader, under the general provisions of the homestead laws and of said act of March 2, 1907, at the price of \$2.50 per acre, and all persons are especially admonished that under said act of Congress it is provided that no person shall be permitted to settle upon, occupy, or enter any of said lands, except in the manner prescribed in this proclamation, until after the 31st day of August, 1909.

17. The usual nonmineral and nonsaline affidavits will not be required with applications to enter made prior to September 1, 1909, but evidence of the nonmineral and nonsaline character of the lands entered after that date must be furnished by the entryman, before their final proofs are accepted.

18. *Proceedings on contests and rejected applications.*—When the register and receiver of the land office at which these lands will become subject to entry for any reason reject the application of any person claiming the right to make entry, under any number assigned to him under these regulations, they will at once advise him of the rejection and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise:

(a) Applications either to file soldier's declaratory statement or to make homestead entry of these lands must, on presentation in accordance with these regulations, be at once accepted or rejected, but the local land officers may, in their discretion, permit amendment of defective applications during the day only on which they are presented. If properly amended on the same day entry may be permitted after the numbers for the day have been exhausted, in their numerical order.

(b) No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

(c) After the rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be

informed of the prior rejected application and that his application, if allowed, will be subject to the disposition of the prior application upon appeal, if any be taken, from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

(d) Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

(e) Applications filed prior to September 1, 1909, to contest entries allowed for these lands, will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior, with proper recommendation, when the matter will be promptly decided.

(f) These regulations will supersede, during the period between March 1, 1909, and September 1, 1909, any Rule of Practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the lands affected by these regulations, and will apply to all appeals taken from actions of local officers during that period affecting any of these lands.

Very respectfully,

JESSE E. WILSON,
Acting Secretary.

Form of application for registration.

I, _____, of _____ post-office, aged _____ years, height _____ feet _____ inches, weight _____ pounds, in support of this, my application for registration for the next land opening to be held after the date hereof, do solemnly swear that I am a citizen of the United States, or have declared my intention to become such; that I am not the owner of more than 160 acres of land, and have not heretofore made any entry or acquired any title to public lands which disqualifies me from making homestead entry; that I honestly desire to enter public lands for my own personal use as a home and for settlement and cultivation, and not for speculation or in the interest of some other person; that *I present this application for that purpose only*, and have not presented and will not present any other affidavit of this kind.

The foregoing was subscribed and sworn to before me, after it was read to or by affiant, this _____ day of _____, 19____, at _____.

THIS APPLICATION MUST BE SWORN TO AT ONE OF THE PLACES NAMED IN THE PROCLAMATION.

Agent's affidavit.

I, _____, of _____ post-office, aged _____ years, height _____ ft. _____ in. _____, and weight _____ lbs., do solemnly swear that I am the duly appointed agent of _____, of _____ post-office, who desires to make entry of lands

under section 2304, Revised Statutes of the United States, as amended by the act of March 1, 1901, at the land opening occurring next after the date of the attached affidavit; and that I have not presented and will not present an affidavit of this character for any other person.

Subscribed and sworn to before me this — day of —, 19—, at —.

THIS AGENT'S APPLICATION MUST BE SWORN TO BY HIM AT ONE OF THE PLACES MENTIONED IN THE PROCLAMATION.

Soldier's and sailor's affidavit.

I, —, of — post-office, do solemnly swear that I am qualified to make a homestead entry and entitled to the benefits of section 2304, Revised Statutes of the United States, as amended by the act of March 1, 1901; that I hereby appoint — my agent and attorney in fact to present my application for registration for the next land opening occurring after the date hereof, and to thereafter file a declaratory statement for me under section 2309, Revised Statutes of the United States, for any lands embraced in said opening; that I make this affidavit in good faith for the sole purpose of securing public lands for a home for myself, and for the purposes of settlement and cultivation, and not for speculation; that I have not presented and will not personally present an affidavit under said proclamation nor authorize any other person than the one named above to present such an affidavit for me. *The name of my agent was written into this affidavit before it was sworn to by me.*

Subscribed and sworn to before me —, 19—.

This may be sworn to before any officer using a seal, in any State or Territory.

INFORMATION RELATIVE TO THE OPENING OF THE ROSEBUD OR TRIPP COUNTY LAND.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 25, 1908.

Any person desiring to register for the opening of the Rosebud lands in South Dakota (Tripp County) under the President's recent proclamation, and the instructions issued by the Secretary of the Interior, must go before a United States commissioner or a judge or a clerk of a court of record, or a notary public in one of the following towns, viz: Chamberlain, Dallas, Gregory, or Presho in South Dakota, or O'Neill or Valentine in Nebraska, and there sign and swear to an application for registration which will be furnished him by the officer before whom he makes his oath. This application must be sworn to between October 5 and October 17, 1908, and after it is sworn to it must be inclosed, unfolded, in an envelope, which will be furnished by the officer administering the oath, and the envelope must then be addressed and delivered to "James W. Witten,

Superintendent of Opening," at either Dallas or Gregory, South Dakota, before 4.30 p. m. on October 17, and not after that, either by mail or in person, or otherwise, but not by registered mail, and the envelope must not have the name of the applicant written on it.

Soldiers and sailors who served for ninety days during the War of the Rebellion, the Spanish-American War, or the Philippine Insurrection, will not be required to go to either of the above-named towns to swear to their applications, but they may appoint agents to present their applications for them, and these appointments may be made and sworn to in any State or Territory. The appointment of an agent by a soldier must be made in writing on a blank form which may be obtained by writing to "James W. Witten, General Land Office, Washington, D. C.," prior to September 25, 1908, or at his headquarters at Dallas, South Dakota, after that date, or from the officer in charge of the registration blanks at either of the towns named above, after October 4. The appointment must be sworn to by the soldier, and should not be made on any form other than the one prescribed for that purpose. The agent's name must be written into the blank form of appointment before the soldier swears to it, as appointments can not be made out in blank and the agent's name subsequently written into them. The agent must go to one of the towns named above and swear to an application for registration, which will be attached to the soldier's appointment, and he can then deliver the application and appointment to the Superintendent of the Opening, by mail or otherwise, at either Dallas or Gregory, South Dakota. The agent may register both for himself and for one soldier, but the same person can not be agent for more than one soldier, and no person will be permitted to take part in the drawing who presents more than one application in his own behalf, either in person or through an agent. A soldier who files by an agent can not, therefore, file in person. Soldiers who did not serve during the wars mentioned above have no greater rights than persons who have never served in the Army at any time.

A drawing will be held at Dallas, South Dakota, on October 19, to determine who of the persons registered will be given the right to make entry. If a person draws a number smaller than 4,001 he will be notified by mail, addressed to the post-office given in his application, unless he subsequently gives another, to appear at some date, probably in the month of March, 1909, when he will be permitted to enter one-quarter section, or less, of these lands, for which he will be required to pay the usual fees and commissions and \$6 an acre. If the number drawn is between 4,000 and 6,001, the applicant will be notified in the same manner of some date in August, 1909, when he can make entry at \$4.50 an acre, if any of the lands remain unentered at that time. The fees and commissions and one-fifth of the purchase

money must be paid when the entry is made, and the remainder of the purchase money in five equal annual payments, without interest. At the time he makes final proof he will be required to pay the usual fees and commissions required of homestead entrymen making proof. If a person enters 160 acres under a number smaller than 4,001 he must, therefore, pay \$192 on the purchase price and \$14 as fees and commissions, or a total of \$206, at the time he makes entry, and he will be required to pay \$153.60 annually thereafter for five years. If he enters 160 acres under a number above 4,000 he must pay \$144 purchase money and \$14 fees and commissions, or a total of \$158, when he makes entry, and subsequently he must pay five yearly annual installments of \$115.20 each.

If an entryman fails to make any annual payment, when it becomes due, or fails to reside on and cultivate the land as the law requires, his entry will be canceled, and all former payments made by him will be forfeited.

After an applicant has made entry, he can obtain patent by complying with the requirements of the homestead law, as to residence and cultivation, for five years, and making the annual payments, or, after actually residing upon and cultivating the land in good faith for the full period of fourteen months, he can obtain title by proving that fact, and paying all the unpaid purchase money. The residence required upon these lands means the actual, bona fide making and maintaining of a home thereon, to the entire exclusion of a home elsewhere.

The requirements as to residence, cultivation, and payment apply to soldiers as well as to others, except that a soldier who served during any of the wars mentioned above may, after residing on the land for twelve months, or longer, claim credit for the period of his military service during such war; or, in other words, when a soldier's military service, added to the period of his residence on the land, equals five years, he will not be required to longer reside upon or cultivate the land, but he must make his installment payments annually, unless he elects to make all of the payments at the time he makes his proof at an earlier date.

Persons are not entitled to register for this opening if they will be under twenty-one years of age at the time they apply to make entry or are married women, and not heads of families, or are not citizens of the United States and have not declared their intentions to become citizens, or are owners of more than one hundred and sixty acres of land, or have obtained title to or are claiming three hundred and twenty acres of land under entries made under the homestead, desert-land, or timber and stone laws since August 30, 1890, or have already made homestead entry for one hundred and sixty acres, if the entry

has been patented or canceled for fraud, or relinquished for a valuable consideration.

Any person who, prior to February 8, 1908, lost, forfeited, or abandoned a homestead entry, made by him, may make entry of one hundred and sixty acres of these lands, if his former entry was not canceled for fraud or relinquished for a valuable consideration.

A person who has obtained patent under a homestead entry for less than one hundred and sixty acres can enter such area of these lands as will, when added to the land embraced in his former entry, amount, in the aggregate, to one hundred and sixty acres. It will not be necessary for a person who intends to make either second or additional entry to mention that fact in his application for registration, but, at the time he applies to make second or additional entry, he must furnish the description and date of his former entry, the number of the entry, the lands entered, and the land office at which the entry was made, in the manner prescribed by regulations governing the making of second and additional entry.

Every person who files an application for registration must swear that he is qualified to make a homestead entry; that he desires to register for the sole purpose of securing lands for his own use, as a home, and for improvement and cultivation; that he does not expect or intend to make entry in the interests of any other person or for speculative purposes. From this, it follows that any person who intends to make entry for the purpose of speculation by selling his relinquishment, or by disposing of the lands at the earliest possible date, must be guilty of false swearing before he can obtain registration.

These lands embrace eight hundred and thirty-eight thousand acres, but I can not, at this time furnish information as to the number of quarter sections which will be subject to entry, as certain portions of these lands are being allotted to Indians, and the area left subject to homestead entry can not be determined until these allotments have been approved. These lands are said to be desirable for farming and grazing, and similar lands in adjoining counties are selling for good prices, but this office can not undertake to give any information as to the character or value of these lands, or as to the character, quantity, or kind of crops they will produce, or as to the climate or annual rainfall in that locality.

I am inclosing herewith a sketch map showing Tripp county and the location of the several towns mentioned above.

Very respectfully,

FRED DENNETT,
Commissioner.

RAILROAD GRANT—SELECTIONS UNDER ACT OF MARCH 2, 1899—
CHARACTER OF LAND.STATE OF IDAHO ET AL. *v.* NORTHERN PACIFIC RY. CO.

The fact that lands were classified as mineral under the act of February 26, 1895, will not prevent selection thereof by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, if otherwise within the terms of that act.

The reservation created by section 5 of the act of July 3, 1890, has no application to a grant of lands in quantity, which can become operative only by selection.

The question as to the character of land for which selection is tendered by the railway company under the act of March 2, 1899, is solely between the government and the company, and where no protest is lodged against a selection, *prima facie* regular and in accordance with the terms of the act, upon the ground that the land selected is mineral in fact and was known to be such at the time of selection, the company will be permitted to perfect its claim.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 5, 1908.* (E. O. P.)

The State of Idaho and numerous homestead applicants have appealed to the Department from your office decision of January 5, 1907, holding that the right of the Northern Pacific Railway Company to select the tracts described in its lists Nos. 61, 63 and 65, was superior to both that of the State and those of the homestead claimants who made no settlement upon the tracts applied for by them prior to the filing of the said lists by the railway company.

The tracts in controversy are in township 44 N., R. 3 E., Coeur d'Alene land district, Idaho, plat of survey of which was filed in the local office July 17, 1905. The odd-numbered sections were classified as mineral under the act of February 26, 1895 (28 Stat., 683). This classification was approved by the Department prior to selection by the company. The returns made at the time of actual government survey classify the same tracts as nonmineral. The railway company filed its said lists Nos. 61, 63 and 65 June 21, July 1, and July 2, 1901, prior to survey and within three months from the filing of the approved plat filed new lists describing the selected land according to the lines of survey. Each of the said selections of the company is made under the provisions of the act of March 2, 1899 (30 Stat., 993).

Application for the survey of said township 44 N., R. 3 E., made on behalf of the State of Idaho as a basis for the acquisition of a preferred right of selection under the act of August 18, 1894 (28 Stat., 372, 394), was received July 8, 1901. The day following the filing of the plat of survey the State tendered its selection, list No. 4, common school indemnity, under section 4 of the act of July 3, 1890 (26 Stat.,

215), of all the tracts previously selected by the company except the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SW. $\frac{1}{4}$ of section 30.

The several homestead applications were presented on the same day the plat of survey was filed.

Your office rejected the State's application to select, together with the applications of the homestead claimants in support of which there were no allegations of settlement on the tracts applied for prior to selection thereof by the railway company, and postponed further action upon the claims of those homestead applicants who set up such prior settlement until opportunity had been afforded them to prove their alleged settlement.

Before considering the correctness of your action with respect to the homestead claimants, the questions presented by the appeal of the State will first be determined, for as between the one of these possessing the superior right to the tracts in conflict and the homestead claimants, principles heretofore announced in other departmental decisions involving a similar question are controlling.

The State in its formal appeal assigns numerous errors on the part of your office, but the argument in opposition to the right asserted by the railway company rests upon three contentions covering substantially all the matters set up in the appeal. It is urged first that the tracts described in the company's lists Nos. 61, 63 and 65, having been classified as mineral under the act of February 26, 1895, *supra*, were not subject to selection under the act of March 2, 1899, *supra*. It appears, however, from the description given in your office decision that said list No. 61 covers parts of even-numbered sections only, while a portion of the tracts described in lists Nos. 63 and 65 are also parts of even-numbered sections. As such sections were not subject to classification under the act of February 26, 1895, *supra*, the first objection of the State can not be considered as applying to these tracts (*Northern Pacific Ry. Co. v. Mann*, 33 L. D., 621, 622).

As to the tracts forming a part of odd-numbered sections properly classified under the act of February 26, 1895, *supra*, this objection to the right of the company to select them under the act of March 2, 1899, *supra*, presents a question which has never been decided by the Department. It is insisted on behalf of the State that the provisions of section 7 of the act of February 26, 1895, *supra*, amount to an absolute prohibition of the right of the Northern Pacific Railroad Company or its successor in interest to acquire title to any of the lands properly classified under said act, and that the prohibition is not removed by any of the provisions of the act of March 2, 1899, *supra*. The position taken by the State that but for the act of February 26, 1895, *supra*, the railway company might have taken the land classified thereunder in *satisfaction of its grant* is well taken. Classifica-

tion as mineral under the same statute also defeats the right of the company to acquire the land under the act of July 1, 1898 (30 Stat., 597, 620; *Northern Pacific Ry. Co. v. Frei*, 34 L. D., 661). With these established propositions as a foundation, the State contends that the intention of Congress to absolutely prevent the company securing title to such land precludes giving such effect to the act of March 2, 1899, *supra*, as will allow the company to defeat that intention. The conclusion that the purpose of the classification act will thus be defeated is based upon the assumption that the acts making the original grant to the railway company and the act of March 2, 1899, *supra*, are in *pari materia* and are to be so construed.

The act of February 26, 1895, limits the right of the company under its original grant, and as repeals by implication are not favored, if the purpose of the act of March 2, 1899, *supra*, is merely to supplement or adjust the grant it can not be so construed as to remove the limitation imposed by the classification act.

The State to sustain its position that the construction of the act of March 2, 1899, *supra*, is controlled by the construction placed by the Department upon the act of July 1, 1898 (30 Stat., 597, 620), takes the ground that the two statutes have a common purpose, and the language used in departmental instructions of February 14, 1899 (28 L. D., 103), and decision rendered in the case of *Northern Pacific Railway Company v. Frei* (34 L. D., 661), is quoted and relied upon. The circular referred to was issued prior to the passage of the act of March 2, 1899, *supra*, and it is clear the directions therein contained can have no reference thereto. The quotation from the decision in the case of *Northern Pacific Railway Company v. Frei*, *supra*, is as follows:

The selection in question (made under the act of July 1, 1898), is not only on behalf of the Northern Pacific Railway Company being made by its successor in interest, but is primarily on account of the Northern Pacific land grant and in the opinion of this Department, any patent or evidence of title given to the Northern Pacific Railway Company, or its successor in interest, *under a claim predicated upon the Northern Pacific land grant* to lands classified as mineral under the provisions of the act of February 26, 1895, *supra*, would be void.

It is observed that the Department was dealing only with the act of July 1, 1898, *supra*, and considered and treated selections made thereunder as "*primarily on account of the Northern Pacific land grant.*" The object of the statute under consideration is *primarily* to aid in the adjustment of the original grant and, as before stated, the limitation imposed upon that grant by the classification act, must of necessity be given the same operation with respect to the adjustment act. A claim asserted by the railway company under the act of July 1, 1898, *supra*, is predicated upon the original grant, as

that act merely makes provision for the substitution of a perfect title to the selected land for a disputed claim to the land on account of which substitution is made, the validity of the company's title to the base land not being the sole determinative factor. The act of March 2, 1899, *supra*, was not, like the act of July 1, 1898, *supra*, intended to operate as an aid in the adjustment of the railroad grant. Congress proceeded upon the theory that so far as the land which the railway company was authorized to convey to the United States was concerned, its title thereto was perfect and that as to this land the grant had already been adjusted. It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act. A voluntary conveyance by the railway company was the most feasible method of reacquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department, every element of a contract is present in the act of March 2, 1899, *supra*, and the act is complete in itself. It should therefore be construed independently of other statutes having a different purpose and imposing other obligations. Thus considered, the construction of this act presents less difficulty, as standing alone it clearly authorizes the company to select land within the area classified under the act of February 26, 1895, *supra*, as freely as in any other portion of the territory to which its right of selection thereunder is restricted.

The second contention of the State is to the effect that upon its admission into the Union a reservation attached to all the land granted it for educational purposes, and that said reservation prevented the subsequent selection of the tracts in dispute by the railway company.

The language of section 5 of the act of July 3, 1890 (26 Stat., 215), when considered in connection with the language of section 11 of the same act, shows clearly that the reservation created by the former section had no application to a grant of land in quantity. In order for such a grant to become operative selection was absolutely essential, and the right of selection was restricted to the "surveyed, unreserved, and unappropriated public lands."

As the railway company was by the act of March 2, 1899, *supra*, authorized to select unsurveyed land and as its selection was made

prior to the initiation of any preferred right of selection by the State, the company's claim is, if its selection is regular in other respects, superior to that asserted by the State.

The third and last contention of the State goes to the regularity of the railway company's selection which it is insisted is "insufficient in form and substance." Most of the argument made in support of this contention rests upon the acceptance of the classification of the selected land under the act of February 26, 1895, *supra*, as evidence of its mineral character. As before stated, this classification is not to be given the same effect with respect to the act of March 2, 1899, *supra*, as is accorded to it with respect to the original grant. If, as the railway company apparently contends, the return made at the time of actual government survey is to be treated as conclusive of the character of the land, the previous classification could be given no consideration. This the Department is, however, unwilling to admit. The earlier classification might be considered as a matter of evidence the same as any other material fact bearing upon the character of the land. To do this the return made at the time of actual government survey can not be accepted as conclusive. In the opinion of the Department Congress did not intend that it should be so treated. The words descriptive of the land which may be selected by the company are "non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made." Two elements are separately enumerated. The land selected must not have been known to be mineral in fact at the date of selection and it must have been returned as non-mineral at the time of actual government survey. The State insists that the showing made on behalf of the company as to the non-mineral character of the land is not sufficient and that the selection should for that reason be rejected. The State seeks to apply the same rule to selections made under the act in question that is applied to selections made under the acts of June 4, 1897 (30 Stat., 11, 36), and June 6, 1900 (31 Stat., 588, 614). The instructions issued under said acts were not intended to govern selections made under other acts. (*Comstock v. Northern Pacific Ry. Co.*, 34 L. D., 88.) They are not, nor should they be, controlling in the present case. By confining the right of the railway company to a selection of land returned as non-mineral at the date of survey, the Department is on its part bound to give some weight to that return as evidence of the actual character of the land. This return of itself, if accepted for any purpose, is *prima facie* evidence that the land is in fact of the character described. The company is not required to overthrow the earlier classification under the act of February 26, 1895, *supra*, and if that classification is not set up as the true one and no question is raised as to the correctness of the

return made at the time of survey, the Department would be unwarranted in assuming that the lands returned as non-mineral were not of the class subject to selection under the act of March 2, 1899, *supra*. This is clearly the effect of the decisions rendered by the Department in the cases of *Davenport v. Northern Pacific Ry. Co.* (32 L. D., 28, 30), and *Bedal et al. v. St. Paul, Minneapolis & Manitoba Ry. Co.* (29 L. D., 254, 255). This question is, after all, one solely between the Government and the selector and where no protest is lodged against the selection upon the ground that the land selected is mineral in fact and was known to be such at the time of selection, the company will be permitted to perfect its claim. If the land were in fact mineral this would defeat the right of the State to take the land under its school grant, and the State is not in the most favorable position to challenge the company's right upon the ground that the showing made by the latter as to the non-mineral character of the land is insufficient.

Under this construction of the law the objections raised by the State to the right of the railway company to select the tracts in controversy under the act of March 2, 1899, *supra*, can not be sustained. As between the State and the railroad company the rights of the latter are superior.

Several of the grounds set up by the homestead claimants in opposition to the right asserted by the railway company are substantially the same as those already herein considered and decided. It is clear if the right of the railway company is superior to that of the State and the claim of the latter is superior to those based upon settlements made after the State's application for survey was filed that the claim of the company must be preferred to that of the settlers. The question of the superior right as between the State and homestead applicants occupying the position described has been settled by numerous decisions of the Department favorably to the State (*Thorpe et al. v. State of Idaho*, 35 L. D., 640; *Williams v. Same*, 36 L. D., 20). The rejection, therefore, of homestead applications in support of which no settlement was alleged prior to selection was proper.

Since the present appeals were taken, several relinquishments of the claim asserted by the State have been filed, also the relinquishment of the individual claim of Walter C. Mandell, but no action of the Department with respect thereto is necessary at this time.

The decision appealed from is, for the reasons herein set forth, affirmed and the papers are herewith returned with direction that the action outlined in your said decision be carried out, except in so far as it may be affected by the filing of the several relinquishments above mentioned.

JOINT ENTRY—SETTLEMENT PRIOR TO SURVEY—DIVISION OF LAND.

SALA *v.* BIDOGGIA.

Where two settlers prior to survey agree as to a line separating their claims, and after survey it is found that their improvements are on the same subdivision, the land department may, under its general and supervisory power, permit them to make joint entry of the land or allow either to make entry of the tract on condition that after completion of title he convey to the other the part set off to him by the agreed line.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 7, 1908.* (J. F. T.)

October 21, 1902, Cattina Sala and Martin Bidoggia presented simultaneous applications to make homestead entry for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, T. 47 N., R. 3 W., with other lands, in Coeur d'Alene, Idaho, land district.

Each party claimed the superior right to make entry of the tract in question by reason of settlement and improvements made before the land was surveyed.

April, 1905, a hearing occurred before the local officers to determine the respective rights of the parties, both of whom appeared in person and by counsel.

The local officers decided that the plaintiff was entitled to the west half and the defendant to the east half of the land in controversy.

Upon appeal to your office you hold, of date November 26, 1907, that in view of the fact that a certain blazed line, agreed upon and established by parties having possessory rights, was for many years considered by the parties in interest as the dividing line between them though subject to change, and of all the surrounding circumstances, that the adjudication of the case should be governed by the principles laid down in the decision of *McKinnon v. Anderson* (27 L. D., 154). In that case it was held that:

Where two settlers prior to survey agree as to the line separating their claims, on the belief that such line would coincide with the official survey, and it is subsequently found that their improvements are on the same subdivision, their right should be adjusted, so far as in conflict, in accordance with the agreed line, by allowing the entry of one for the tract in question, on condition that he makes title to the other for such portion of said tract as would fall to him under the original agreement.

You further say:

The method followed in the above cited case is provided for by section 2274 of the Revised Statutes, and should be followed in this case. Plaintiff should have all the land west of the blazed line agreed upon and defendant all east of that line. To this end plaintiff will be allowed to enter the subdivision in dispute upon condition that within ninety days from notice hereof she tender to defendant an agreement in writing to convey to him all that portion of said

tract east of said blazed line, when she shall have completed her entry of the tract applied for; and if she decline to enter into such agreement then defendant may make entry of the tract in dispute upon condition that he tender to plaintiff an agreement in writing to convey to her all of said tract west of the blazed line, upon completion of his entry. If both parties fail or refuse to make entry upon these terms and conditions, then they will be allowed to make joint entry, in accordance with the provisions of section 2274, Revised Statutes, Edward J. Doyle (7 L. D., 3), *Ferguson v. Snyder* (10 L. D., 234), and *Nelson v. Horne* (13 L. D., 335).

From this decision Sala has appealed to the Department, claiming the entire tract.

Your findings of fact are not questioned upon this appeal, but it is contended that the improvements upon which Bidoggia bases his claim are so small as to be properly disregarded under the principle *De minimis non curat lex*. Upon this point it is found from the record that while the improvements of each of the parties in interest upon the land in question are small, they are such as to entitle both parties to full and equal consideration.

It is further contended that section 2274, R. S., was repealed by an act dated March 3, 1891 (26 Stat., 1097), and that the procedure fixed by you for the division of this land is, therefore, not within the power or authority of the Department.

Said section 2274 was enacted March 3, 1873, and was a part of the pre-emption laws (General Land Office Circular January 25, 1904, p. 124). It was made essentially a part of the homestead laws by section 3 of the act approved May 14, 1880. (General Land Office Circular of January 25, 1904, p. 151; 21 Stat., p. 40.) The repeal relied upon is found in section 4 of the act of March 3, 1891 (26 Stat., 1097, General Land Office Circular of January 25, 1904, p. 201), which is the general repeal of the pre-emption laws. It is very doubtful if this repeal of the pre-emption laws cuts off any of the rights of a homestead settler under the provisions of said section 2274. But however this may be, it is considered that the equitable division of this land as directed by you is within the general and supervisory authority of the Department, and that the procedure fixed by you is correct and in accord with the departmental authorities cited in that part of your decision above quoted.

Your decision is affirmed.

SOLDIERS' ADDITIONAL—REJECTION OF APPLICATION—RETURN OF PAPERS.

FRED A. KRIBS.

Where an application to make soldiers' additional entry is rejected solely for want of satisfactory proof of identity of the soldier and the entryman, and the claimed right is not found to be invalid, the owner thereof is entitled to have the additional right papers returned to him.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, September 8, 1908.* (J. R. W.)

Fred A. Kribs appealed from your decision of March 3, 1908, refusing to return to him the papers, or evidences of right, filed by him as assignee of Kessiah Belt, widow of William Belt.

August 31, 1898, the Duluth local office transmitted to you the application of Kribs as assignee of Kessiah Belt, widow of William Belt, under section 2307, Revised Statutes, to enter land at Duluth, Minnesota, additional to a former homestead entry made by William Belt. The description of the land included in Belt's original homestead entry is not in the record nor is that material. The application for additional entry failed for want of satisfactory proof that William Belt, the soldier, was the same person who made the original entry upon which the Duluth additional application was based, and the case was closed September 24, 1906.

February 15, 1908, counsel for Kribs filed relinquishment of the land applied for at Duluth and requested return of the additional right papers. You held that after Kribs's case was closed no right remained to him in the land and "as the validity of said alleged right has not been proven, his request for returning the transfer of the same to him is denied."

The additional right claim and assignment papers were delivered to officers of the land department for inspection and acceptance as payment for a tract of land sought to be entered in satisfaction of the right asserted. The possession of these papers by the United States is in principle no different from the possession of a deed and abstract of title delivered in proposed exchange under the act of June 4, 1897 (30 Stat., 36). The papers are not a record or property of the United States evidencing a transaction of disposal of public lands. The United States has parted with or given nothing upon faith of them. The vendor in a transaction of sale or exchange obviously can not hold both that which was to be received and what was to be given as its equivalent—the thing and the price. He must convey, or on failure of the transaction he must return what he has received. William E. Moses (33 L. D., 333). He has no claim to both merely because at failure of the negotiation he had possession of both.

The present case is not like that of payment of counterfeit money, forged land warrants, or scrip certificates, or similar genuine instruments once previously recognized and satisfied. In such case no thing of possible value has been surrendered to the Government or is in its possession. The thing is a mere semblance serving no possible purpose except to be an instrument of fraud, and the Government will not permit it again to float. C. L. Hood (34 L. D., 610, 613).

In the present case you did not adjudge Belt had no additional right. The record did not contain facts whereon to base such judgment. The soldier and the original entryman were not identified to be the same person. The claim of additional right may be perfectly valid. It was not proved and the entry failed for that reason alone.

Attention is called to prior departmental decisions, unreported, refusing return of additional right papers.

September 27, 1904, in Donald S. McCalman, assignee of Thomas McGee, involving lot 11, Sec. 31, T. 27 N., R. 11 W., Marquette, Michigan, the application for entry was rejected because McGee's original entry, on which he based claim of additional right, was illegal at its inception and his homestead right was complete in him not exercised in any part so that no additional right ever arose and his claim of additional right was adjudged baseless and invalid. The case was within the principle of C. L. Hood, *supra*.

May 2, 1906, in Arthur McBride, assignee of Sarah, widow of William Oddy, involving lot 3, Sec. 4, T. 145 N., R. 33 W., 5th P. M., Cass Lake, Minnesota, the existence of the additional right in William Oddy was not questioned. You required and the assignee failed to furnish satisfactory evidence that the right "passed upon the death of the soldier to his widow." By the statute it passed to be exercised by her "if unmarried," but in case of her marriage passed to the soldier's minor children. As her right to sell or exercise the right depended on her continued widowhood it was competent for your office to require that the condition on which her right depended continued to the time of her assignment. The continued identity of name did not preclude her marriage. Without proof that she had not married after her former husband's death McBride did not show a title and was not entitled to return of the additional right papers. The decision was based on want of evidence of his title.

January 17, 1907, in Exzalia J. Pepin, assignee of Fry, administrator of Fry's estate, involving the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 34, T. 33 N., R. 16 E., Great Falls, Montana, the entry failed because the land had been withdrawn under the reclamation act and was not subject to entry. Pepin claimed as assignee of the administrator. The soldier died testate August, 1894, bequeathing his residuary estate to his two children, Randall and Wealthie D. Fry, in equal shares. His widow died September, 1894, without exercising or assigning the right and the soldier left no minor children, so that the additional right remained at his death part of his estate, by his will vested in his two residuary legatees. The administrator had nothing to convey as such. The Department held:

The additional right was not subject to the administration proceedings and sale on which the assignment and sale rest, the soldier's estate having been divested thereof by his will . . . the applicant took nothing by his assignment and is not entitled to return of the papers.

In the case under review here the claimant took directly from the soldier's widow who was by statute the first in line of succession. There is no room to question claimant's title to all right the soldier had. None of the decisions above noted are authority to refuse return of papers in this case surrendered to the United States as consideration for an entry that has failed. The claimant is entitled to return of his imperfect papers that he may correct the proof and establish his right if evidence of the asserted fact of identity of person exists and can be obtained by him.

Your decision is reversed.

SECOND TIMBER AND STONE APPLICATION—RIGHT EXHAUSTED BY ONE APPLICATION.

GEORGE F. BRICE.

The filing of an application under the timber and stone act, for land subject thereto, and to the completion of which the government interposes no obstacle, exhausts the right of the applicant under that act. *Pietkiewicz et al. v. Richmond*, 29 L. D., 195, overruled.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 8, 1908.* (E. F. B.)

By decision of April 2, 1908, the Department affirmed the decision of your office rejecting the application of George F. Brice to purchase under the timber and stone act the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 22, T. 26 S., R. 8 W., Roseburg, Oregon. Brice's application was rejected because the land had been included in a withdrawal for forestry purposes made March 2, 1907, but your decision was so far modified as to allow a reinstatement of a previous application filed by Brice to purchase under said act the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, T. 28 S., R. 4 W., if there be no adverse claim to the same, and "if it should develop . . . that Brice's application to purchase the land in section 10 can not, for good and sufficient reasons, be reinstated, then he should be allowed to make entry of other lands under the timber and stone act as if no prior application had been filed by him."

An adverse claim to the land in section 10 has intervened, thus preventing reinstatement of his application to purchase that land and in order to establish a right to purchase the land covered by his pending application it is sought by the motion for review to modify that portion of the decision complained of in which it was stated—

that Brice acquired no such vested right by his application of February 28, 1907, as excepted the lands embraced therein from the reservation of March 2, 1907, for forestry purposes, is too well established to require discussion. Hence his application therefor was for that reason properly denied.

No vested right is acquired by the filing of an application to purchase under the timber and stone act. By such application an inchoate right is acquired that will protect the applicant against the claims of others, but he is not thereby vested with any such right as will prevent the United States from disposing of the land or withdrawing it from entry. (Instructions, 32 L. D., 387; Board of Control *v.* Torrence, *Ib.*, 472; Charles O. De Land, 36 L. D., 18.) Withdrawals for forestry purposes, like withdrawals under the Reclamation Act, have the force of a legislative withdrawal, and are effective as to all lands to which a vested right has not attached, unless expressly excepted from the force and effect of the proclamation creating the reservation.

The proclamation withdrawing this land excepted from its operation all lands covered by a lawful filing duly of record in the proper land office where the claimant continues to comply with the law under which the filing was made. It is general in its terms, reserving for public use all lands within the designated boundaries, subject to disposal and control by the government, that are not specifically excepted therefrom. The exception or proviso takes no land out of the operation of the proclamation that does not clearly fall within the terms of the proviso.

It is true there is no difference in principle between a filing that has been actually placed of record and a filing that has been offered and erroneously rejected. But that is not this case. No filing upon Brice's application to purchase the land in question had been made "duly of record in the proper United States land office" at the time of the withdrawal of the land for forestry purposes, and the application had not been rejected either properly or improperly. The application as presented could not have been accepted by the local officers and placed of record without authority from your office.

The timber and stone act requires the applicant to state under oath that he "has made no other application under this act." The making of one application for a tract of land to which he could have completed title exhausted his right. Brice had twice applied to purchase lands under said act, and it does not appear that there was any obstacle to the perfecting of title under either application if he was qualified to purchase. When the application in question was presented it was accompanied by an affidavit showing *prima facie* that he was not qualified to make entry under the timber and stone act, and as the local officers had no authority to place a filing of record upon such application without authority it was transmitted to your office for your consideration. Before it was received by your office the land had been withdrawn for forestry purposes and it could not then have been allowed, as it did not come within the terms of the excepting clause of the proclamation.

If that were the only question presented by this record, the case might be disposed of by merely denying the motion. But in the decision of the Department it was said that if Brice's application as to the lands in section 10 can not for sufficient reasons be reinstated he should be allowed to make entry of other lands under the timber and stone act as if no prior application had been filed by him. That ruling was made in view of the allegation that the lands in section 8 first applied for by Brice were patented lands. It was so stated in an affidavit filed by him and upon that statement he was advised by the local officers that he would be allowed to make another application. He then applied to purchase the land in section 10 which he relinquished upon the advice of the local officers that it would not withhold the land from other applications.

The allegation by Brice that the lands first applied for were patented lands was recited in your decision as a statement of fact and not being denied it was accepted by the Department without further inquiry.

An application for patented lands does not exhaust the right of purchase under the timber and stone act, although received for filing and placed of record.

If the lands first applied for by Brice had been patented at the time of his application his second application would not have been unlawful, not because the act authorized a second right of purchase but because the first application was allowed for lands for which the United States could not convey a title and hence the right of purchase was not exercised.

It was this view that controlled the action of the Department directing that Brice's second application be reinstated if no obstacle had intervened, and if for any sufficient cause it could not be done, Brice may be allowed to purchase other lands as if no former application had been filed by him.

Upon the accepted statement of facts it was considered by the Department that Brice's failing to complete title under either application was not due to his fault but to the errors of the local office, first in allowing a filing for patented lands, and second, because of what was supposed to be the erroneous advice that his second application would not hold the land against the applications of others.

It is now ascertained upon inquiry of your office that the lands first applied for have not been patented and that there was no obstacle to the perfecting of title under that application. His right was thereby exhausted and he acquired no right whatever under a subsequent application.

In the case of *Pietkiewicz v. Richmond* (29 L. D., 195) there is an expression of opinion to the effect that a second application may be allowed where the applicant had not completed purchase under the

first application, and that a mere offer to purchase under the act will not affect the right to make a second application.

That expression was not necessary to the decision of the case. The second application was sustained upon the ground that the relinquishment of the first was made to avoid conflict with a prior claim growing out of an honest mistake by the applicant as to the lines of the land first applied for.

The language of the statute is so free from ambiguity as to leave no doubt whatever of its object and purpose, especially when read in the light of a similar provision in other acts restricting the right to one application.

The statute requires that the applicant shall make affidavit that he "*has made no other application under this act.*" The declaration in the preemption act that where a party has filed his declaration of intention to claim the benefits of such provisions (the right of preemption) for one tract of land he shall not file at any future time a second declaration for another tract, is a positive prohibition against the allowance of a second filing. *Baldwin v. Stark* (107 U. S., 463). But it is no more positive than the language in the timber and stone act, and the latter act should be similarly construed in determining the rights of applicants thereunder.

In construing that provision of the preemption act it has been uniformly held to mean that the filing must have been made on land subject to such filing and to which the title can be perfected.

The rule as stated in *Allen v. Baird* (6 L. D., 298) is that a pre-emptor may file but one declaratory statement for land free to settlement and entry. The only exception is where the pre-emptor is unable to perfect his entry on account of some prior claim and there is no fault on his part. See also *Shelton v. Reynolds* (6 L. D., 617) and *Cowan v. Asher* (Ib., 785). A second application has also been allowed where the consummation of title under the first filing was not practicable from circumstances over which the applicant has no control and which could not have been foreseen and discovered by the exercise of reasonable diligence and precaution. *George Thorniley* (13 L. D., 177).

But in all these cases the rule has been strictly adhered to that one filing exhausts the right and wherever a second application has been allowed it was because the filing of the first declaratory statement was not an exercise of the right, applying the general rule that when the land is not subject to disposal under such filing or application, or where the applicant, through no fault of his, is unable to perfect title to the land he will not be considered as having exercised the right given by the statute.

While in some cases there may be circumstances that would warrant a more liberal rule in determining whether a person has exer-

cised his right of purchase by the filing of an application under which he fails to perfect title, the rule above stated should control generally and a second application should be denied where the land first applied for was subject to disposal under such application and no obstacle to the perfecting of title was interposed by the United States.

The ruling in the case of *Pietkiewicz v. Richmond*, *supra*, is not a proper construction of the act and of the rulings of the Department and so far as it is in conflict with the view announced herein it is overruled.

As Brice exhausted his right of purchase under said act by his application to purchase the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 8, T. 24 S., R. 1 W., which were then subject to disposal under his application, so much of the decision of the Department of April 2, 1908, as allowed a reinstatement of his second application to purchase the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, T. 28 S., R. 24 W., and in the event that there is any obstacle to the reinstatement of such application, to make entry of other lands under said act as if no other application had been filed by him, is vacated and set aside, and the motion for review is also denied.

DESERT LAND ENTRY—RIGHT OF ASSIGNEE TO RELINQUISH AND
MAKE ORIGINAL ENTRY OF SAME TRACT.

IDA LUNDQUIST.

One who after attempting to perfect a desert land entry taken by assignment relinquishes the same in the face of charges by a special agent is disqualified to make original entry of the same tract.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 8, 1908.* (F. W. C.)

Ida Lundquist has appealed to the Department from your office decision of September 18, 1907, holding for cancellation her desert land entry, made March 25, 1907, of the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 27 N., R. 59 E.; the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 6, T. 22 N., R. 29 E., Greatfalls land district, Montana.

May 14, 1901, Mary M. Soule made desert land entry of the same land, which entry she assigned to Lundquist, December 15, 1903. Lundquist submitted final proof thereon and received final certificate, March 24, 1905. The entry was suspended September 29, 1905, upon the report of a special agent and canceled March 21, 1907, on which date the relinquishment of Lundquist, filed some time prior thereto, was noted on the records of the local office. The entry now under consideration was then allowed. It appears also that, March 30, 1907, Frank M. Catlin filed homestead application for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$,

Sec. 1, T. 27 N., R. 58 E., N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 6, T. 27 N., R. 59 E., included in desert land entry of Lundquist against which he filed a protest.

The special agent's report above referred to afforded foundation for a charge that the land was not desert in character, and Lundquist relinquished the entry acquired by assignment from Soule before a hearing was had to determine this matter. It is at once apparent that even had Lundquist been qualified to make entry in her own right she should not have been permitted to enter this particular land until its desert character had been established. The relinquishment of the entry made by Soule can not operate to relieve Lundquist from proceeding to a hearing for the purpose of determining the issue raised in the charge growing out of the special agent's report.

Lundquist makes affidavit that at the time she purchased the relinquishment of Soule she had no knowledge of any fraud in connection therewith and thereafter proceeded in good faith and expended about \$1200 in improving and reclaiming the land and only relinquished because advised by the special agent that he was in possession of evidence sufficient to establish the charges growing out of his report and that she had not by taking the assignment exhausted her right to make desert land entry. These statements are supported by other matters contained in the record and it is not to be denied that Lundquist is entitled to equitable consideration. Equitable relief can not, however, be extended where a statutory provision is opposed, and unless she was entitled to make this desert land entry the same must be canceled, as the Department cannot waive the requirements of the statute.

The question presented is whether one who has sought to perfect a desert land entry taken by assignment is disqualified to make original entry of the same tract. The act of March 3, 1877 (19 Stat., 377), confers the right to make but one desert land entry. While the area that may be entered is cut down by the amendatory act of March 3, 1891 (26 Stat., 1095), the right, so far as making entry is concerned, remains the same. The amendatory act authorizes assignments of desert land entries but restricts the right to hold by assignment or otherwise more than 320 acres. Lundquist, by submitting final proof and receiving final certificate on the entry assigned to her by Soule, availed herself fully of the privileges conferred by the desert land act the same as though that entry had been originally made by her.

It is not intended hereby to hold that all persons at any time claiming an interest under an assignment made of a desert land entry are thereby disqualified to claim other lands under the same desert land laws, but, if it were possible to obtain title under the assignment, Lundquist could not by relinquishment restore to herself the right already exhausted.

Even had Lundquist been qualified to make another desert land entry, she could not have entered the land for which she applied until its desert character had been established, and might be required to show that it was of that character at the date of *her* entry, in which event the reclamation, if accomplished under the assignment, might work to her disadvantage. Inasmuch as she relinquished the assigned entry, through advice of government officers, under the circumstances disclosed, she should be permitted to apply for a hearing upon the special agent's charge against her assigned entry and in the event the final decision is favorable to her, the former entry should be reinstated.

The decision of your office, as thus modified, is affirmed.

SECOND HOMESTEAD—CHEROKEE OUTLET—ACTS OF JUNE 5, 1900, AND
APRIL 28, 1904.

PHILLIPS *v.* THOMAS.

Lands in the Cherokee Outlet, opened to homestead settlement and entry by the act of March 3, 1893, are subject to the provisions of the acts of June 5, 1900, and April 28, 1904, relating to second homestead entries.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 9, 1908.* (J. F. T.)

Herbert Thomas has filed motion or application for review of departmental decision of June 9, 1908 (not reported), affirming the decision of your office of November 22, 1907, allowing the application of Samuel T. Phillips to make second homestead entry for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, and S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 21, T. 21 N., R. 22 W., Woodward, Oklahoma, land district, and rejecting his (Thomas's) application to make homestead entry for the same land.

It is contended upon the presentation of this motion that the provisions of the act of March 3, 1893, and the Presidential proclamation of August 19, 1893, opening for homestead settlement the Cherokee Outlet, of which the tract in controversy is a part, contemplated but one homestead entry, and that neither the act of June 5, 1900 (31 Stat., 267), nor the act of April 28, 1904 (33 Stat., 527), relating to second entries, is applicable in this case.

It is the opinion of the Department that the acts and proclamations under which the said Cherokee Outlet was opened to homestead entry became and are a part of the homestead law, and that the acts of 1900 and 1904 above mentioned are properly considered and applied in the determination of Mr. Phillips's application to make second homestead entry.

The motion for review is therefore denied.

RIGHT OF WAY—LOS ANGELES—ACT OF JUNE 30, 1906.

SILVER LAKE POWER & IRRIGATION CO. *v.* CITY OF LOS ANGELES.

The land department is without jurisdiction to determine the question as to the right to water as between rival applicants for rights of way and reservoir sites.

The fact that there may be outstanding claims in conflict with a right of way applied for under the provisions of the act of June 30, 1906, will not prevent the allowance of the application and approval of the maps subject to superior rights.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, September 9, 1908. (G. W. W.) (E. O. P.)

The Silver Lake Power & Irrigation Company has appealed to the Department from your office decision of August 26, 1907, dismissing its protest against the application for right of way and reservoir sites filed by the City of Los Angeles under the provisions of the act of June 30, 1906 (34 Stat., 801). Said protest is lodged against that portion of the application for the right of way extending from a point in T. 11 S., R. 34 E., to a point in T. 32 S., R. 35 E., M. D. M., and the reservoir sites connected therewith described as the Lower and Upper Haiwee reservoirs, also the Long Valley reservoir in Tps. 3 and 4 S., Rgs. 29 and 30 E., M. D. M., and lands adjacent thereto. As to all except the last named the City of Los Angeles (hereinafter called the city) filed its maps and field notes of survey between January 25, 1907, and May 8, 1907. July 12, 1907, map and field notes were regularly filed by it covering the Long Valley reservoir site.

April 5, 1907, the company filed copy of its articles of incorporation and proofs of organization and seven maps, with field notes in duplicate, for right of way and reservoir sites, and July 11, 1907, map and field notes covering the Long Valley reservoir. These maps were all filed for approval by the company under the provisions of sections 18 to 21 inclusive of the act of March 3, 1891 (26 Stat., 1095), and section 2 of the act of May 11, 1898 (30 Stat., 404). The lands traversed by said proposed rights of way are in the Independence land district, California, some of them being in National Forests, some withdrawn under the act of June 17, 1902 (32 Stat., 388), in connection with the Owens River reclamation project, and some within the withdrawal made expressly to protect the rights of the city under said act of June 30, 1906, *supra*. It is not disputed that an irreconcilable conflict exists between the claims asserted by the city and those advanced by the company.

It is contended by the company, however, that its rights are superior to those of the city, this contention being based upon numerous grounds.

It is urged in argument that the company having succeeded to the rights of prior appropriators, is entitled to the use of the water neces-

sary to the success of the city's project and that as an incident to the right to such water it has a vested interest in the right of way in conflict with that sought by the city. Much is advanced in support of the claimed right of the company to the use of the water; but this is a matter which the Department must leave to determination elsewhere, either by amicable arrangement between the parties or before the proper courts. The Department is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the State courts. (Kings River Power Co. v. Knight, 32 L. D., 144; Chicala Water Co. v. Lytle Creek Light & Power Co., 26 L. D., 520; New Bear Valley Irrigation Co. v. Roberts, Trustee, 30 L. D., 382.) The claim that a right of way, substantially as applied for, is vested in the company is asserted under the provisions of sections 2339 and 2340 of the Revised Statutes, though it is admitted there had been no actual construction of the reservoirs, ditches and canals upon which said right of way was predicated. The failure of the company to proceed with such construction is sought to be excused by the plea that the withdrawal of the land for irrigation purposes prevented a continuance of the work. It is difficult to understand how the withdrawal could have had this effect, for if the right is now vested in the company it had as effectually vested prior to that withdrawal and could not have been prejudiced or defeated thereby as such withdrawal was effective only as to inchoate rights and did not operate to destroy those already vested. The claim of vested rights is inconsistent with that asserted under the acts of March 3, 1891, *supra*, and May 11, 1898, *supra*, for if the right has in fact been acquired under sections 2339 and 2340 of the Revised Statutes no further steps are necessary to protect it and the filing of maps and field notes and the approval of the application for a right of way will add nothing to the right (Santa Fe Pacific R. R. Co., 29 L. D., 213; Lincoln County Supply & Land Co. v. Big Sandy Reservoir Co., 32 L. D., 463, 465). Further than this, if such right is held by the company the approval of the city's application under the act of June 30, 1906, *supra*, will not injure or destroy it.

Considering the claim of the company merely as an application to acquire a right of way and not as a vested right, it is clear the city occupies the stronger position and that its right must be recognized unless some of the matters set up in the protest amount to conditions precedent and have not been complied with by the city.

It is not denied that the city filed the maps, etc., required by section 1 of the act of June 30, 1906, *supra*, within the time prescribed by section 2 thereof. All of said maps, etc., except that covering the Upper Haiwee reservoir and Haiwee Creek ditch were filed prior to the application of the company. Though the company first presented its application for the Long Valley reservoir this was not done until

more than a year after the preferred right of the city to purchase certain lands within the area embracing said reservoir had attached, as provided by section 4 of the act of June 30, 1906, *supra*. The mere fact that the company first presented its application cannot under the plain terms of said section operate to defeat the preferred right of the city. If as contended by the company its right to the Long Valley reservoir had vested prior to the passage of the act, then the attachment of the preferred right granted would have been intercepted, but as before stated, if this is a fact, the approval of the city's application will not destroy such right which may and properly must be established and protected by the courts.

The contention of the company that the city can secure no right of way until it has procured the relinquishment or acquired title to all outstanding claims with the enjoyment of which such right of way interferes is sound in so far as it relates to the right effected by such right of way. It does not follow, however, that the Secretary of the Interior may not under the plain terms of the statute approve the maps, etc., and allow the application subject to such superior outstanding claims. As to them the approval can have no force or effect. Neither will the Department attempt to adjudicate or determine the nature and extent of such rights, that matter being one solely within the province of the courts. It would be futile for the Department to attempt to base its approval of the city's application upon a decision of these questions. Its duty is to approve the application, if regular in other respects, subject to such outstanding claims, leaving the parties to adjust their conflicting claims by settlement either in or out of court. To attempt to do more would go beyond its jurisdiction and in so far as its powers were exceeded render its action absolutely void.

In the opinion of the Department the rights asserted by the company, unless vested, were not excepted from the operation of the act of June 30, 1906, and the city having, so far as appears from anything contained in the present record, taken the proper steps to protect the right granted it by said act, is entitled to claim all the benefits thereby conferred.

Some objection is raised to the consideration by your office of the questions presented by the protest of the company on the ground that such matters could only be passed upon by the Secretary of the Interior. It is not believed this objection was intended seriously as it is well-settled that the acts of the land department are in law and in fact the acts of the Secretary of the Interior.

After carefully considering the argument made in support of the appeal, the Department finds no sufficient ground for disturbing the action of your office, and the same is accordingly hereby affirmed.

JENNINGS v. STOW.

Motion for review of departmental decision of May 9, 1908, 36 L. D., 405, denied by First Assistant Secretary Pierce, September 9, 1908.

MINING CLAIM—PATENT PROCEEDING—AFFIDAVIT OF POSTING—VERIFICATION.

EL PASO BRICK COMPANY.

The statutory requirements that the fact of posting of notice upon a mining claim shall be shown by an affidavit of at least two persons, and that such affidavit shall be verified before an officer authorized to administer oaths within the land district where the claim is situated, are mandatory; and the defect in patent proceedings due to the execution of such affidavit outside of the land district can not be cured by the subsequent filing of a properly verified affidavit.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 9, 1908.* (E. B. C.)

The El Paso Brick Company, a corporation, has appealed from your office decision of September 4, 1906, which held for cancellation the company's entry, No. 719, made October 23, 1905, for the International, Aluminum, and Hortense placer mining claims, constituting the Aluminum placer group, survey No. 1162, Las Cruces, New Mexico, land district, for the reason that the affidavit of posting of the plat and notice on the land was subscribed and sworn to before a notary public in and for the county of El Paso, State of Texas, and not before an officer authorized to administer oaths within the land district where the claims are situated, as required by section 2335 of the Revised Statutes.

August 2, 1905, the company filed, with other documents, its application for patent, duly verified on the preceding day before the register of the local office by its authorized attorney in fact, wherein, among other things, he avers—

that he posted in a conspicuous place on said lands his notice of intention to apply for patent, together with a copy of aforesaid plat on the 10th day of June, 1904, which said notice and plat is now so posted on said lands and that a copy of said notice, together with the proof of posting same attached thereto, is filed herewith.

The proof of posting referred to consists of the affidavit of two persons, as having been present on June 10, 1904, when the plat and notice were posted upon the claims in a conspicuous place, which is described with definiteness and particularity, but such affidavit was executed before a notary public in the State of Texas, as above stated.

The plat and notice remained posted until October 20, 1905. Publication began August 11, 1905, and was continued for the full period of sixty days, concurrently with posting upon the land and in the local office.

By decision of April 10, 1906, your office found the entry to be defective in the following particulars, namely: that no sworn statement as to fees and charges had been filed; that no evidence as to whether the claims contained known veins or lodes was furnished; that the affidavits as to posting and continuous posting were not executed within the land district; that the Hortense claim appeared to contain an excess in area; that full title to the Aluminum claim was not shown to be in the company; that the requisite improvements were not shown; that the mineral character of the land did not satisfactorily appear; and that the Aluminum and Hortense claims were irregular in shape and no sufficient reason was shown for the failure to conform them as near as practicable with the United States system of public-land surveys. The company was granted sixty days in which to show cause why the entry should not be canceled. In response numerous affidavits and exhibits, designed to overcome the above objections, were filed on behalf of the company, and among them, certain affidavits executed before a notary public within the land district showing the fact of the seasonable posting on the land.

September 4, 1906, your office considered the showing submitted, and stated that it appeared to be necessary to discuss but one feature of the case in order to show that the entry was fatally defective, namely, the original affidavit as to posting. Finding that that affidavit was not executed as required by the statute, and citing as authorities the cases of *Mattes v. Treasury, etc., Co.* (34 L. D., 314) and *Frazier Borate Mining Co. v. Calm* (departmental decision of March 17, 1905, unreported), your office concluded that the entry must be held for cancellation. The pending appeal followed.

The appellant company has assigned a number of specifications of error. Additional affidavits and exhibits have been filed by the company for the purpose of sustaining the entry, and exhaustive printed briefs and arguments have been submitted by counsel.

Certain persons asserting claims to portions of the land have filed protests against the entry, and on their behalf there have been presented extensive arguments and counter-affidavits designed to support the decisions of your office. Up to the present time, however, the case has been an *ex parte* proceeding.

It is not necessary, and would serve no useful purpose at this time, to enter into details as to the discussion presented by the respective counsel, which covers a wide range. Suffice it to state that the appellant company earnestly contends, in effect, that the defect as to the

affidavit of posting upon the claims is not fatal to the entry under the circumstances of this case and does not go to the jurisdiction of the land department to entertain the present patent proceedings. In other words, it is argued that the provision of the statute, as to the filing of the affidavit of two witnesses showing posting upon the land, is not mandatory but directory; that the jurisdiction of the local officers attaches by virtue of the *fact of posting*, which is not questioned here, and not by reason of the filing of the *proof* of such fact in the precise form directed by the statute, provided the *fact of posting* clearly appears otherwise, as it is claimed that it did in this case by the allegations contained in the patent application.

The following provisions of the Revised Statutes are pertinent to this case:

Sec. 2325. . . . Any person, association, or corporation . . . who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, . . . and shall post a copy of such plat, together with a notice of such application for patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period.

Sec. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office.

With the contention of the company the Department is unable to agree. The allegations of the application are verified by but one person, while the statute requires "an affidavit of at least two persons." Section 2325, *supra*. And the Department has heretofore held that these particular provisions of the statute are mandatory. In the case of *Mojave Mining and Milling Co. v. Karma Mining Co.* (34 L. D., 583-6), in which the affidavit of posting contained no statement that the plat of the claim was posted, or in any manner mentioned or referred to it, the following language was used:

The statutory requirement that the fact of posting shall be shown by an affidavit of at least two persons is mandatory, and one against which the land department is without authority to grant relief. Until such affidavit is filed the register is without authority to proceed upon the application, and should not attempt to do so in any case. As the required affidavit was not filed in this case the proceedings upon the application for patent were without authority of law. In this particular the terms of the statute were not complied with and

there is therefore no assumption that the applicant company is entitled to a patent and that no adverse claim exists. Such being the state of the record, the patent proceedings must fall, and it is not material to inquire whether the plat and notice were in fact posted as required or not. The entry will be canceled, but without prejudice to the renewal of patent proceedings should the applicant company so desire.

In the case of the Frazier Borate Mining Co. *v.* Calm (unreported departmental decision of June 15, 1905, on review), where the question involved was the verification of an application for patent and an affidavit of posting, in each case outside of the land district, the Department held as follows, the quotation also appearing in the case of Milford Metal Mines Investment Co. (35 L. D., 174, 175) :

Neither section 2335 of the Revised Statutes, nor any other provision of the mining laws, authorizes the verification of applications for patent or affidavits such as here involved otherwise than before an officer authorized to administer oaths within the land district where the claim is situated. The attempted verification of the application and affidavit in question before an officer acting without authority under the law, was of no more legal effect than if no attempt at verification had been made; and the notice published by the register based upon such application and affidavit, being without legal foundation, was fatally defective. The case was therefore not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings. The notice being invalid, the entry can not stand. (Southern Cross Gold Mining Company *v.* Sexton *et al.*, 31 L. D., 415).

Having under consideration the verification of an adverse claim, the Department, in the case of Mattes *v.* Treasury, etc., Co., on review (34 L. D., 314), held as follows (syllabus) :

All affidavits under the mining laws are required to be verified in accordance with the provisions of section 2335 of the Revised Statutes, except where authority for their execution is otherwise specifically given by statute.

The foregoing views of the Department are in harmony with, and are re-enforced by, other cases in which a similar principle has been invoked. In the case of Rico Lode (8 L. D., 223) the entry was held to be invalid because the application, as well as all other papers except the proof of continuous posting, was verified by the attorney in fact, while the applicants themselves were residents of, and were within, the land district at the time application was made. In the case of Crosby and Other Lode Claims (35 L. D., 434) the application for patent was held to be a nullity because verified by an agent, the applicants being residents of the land district and it not being shown that at the time the application was made they were in fact not within the same; and a request that the case be submitted for equitable consideration and action under sections 2450 to 2457, inclusive, of the Revised Statutes, was denied. The application for patent in the case of the North Clyde Quartz Mining Claim and Millsite (35 L. D., 455) was held to be bad because verified outside of the land district.

In each of these cases the proceedings were held to be invalid and the entry ordered canceled.

In view of the foregoing it must be held that the affidavit of posting here in question is fatally defective. The defect is not a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. The statutory provisions involved are mandatory. Their observance is among the essentials to the jurisdiction of the local officers to entertain the patent proceedings. The requisite statutory proof as to posting not having been theretofore filed, the register was without authority to direct the publication of the notice or otherwise proceed; and the notice, although in fact published and posted, being without the necessary legal basis, was a nullity and ineffectual for any purpose. The patent proceedings therefore fall and the entry will be canceled.

The appellant company puts forward a further and alternative contention to the effect that, even though the entry should be considered defective, yet it should be submitted for equitable consideration under said sections 2450 to 2457 of the Revised Statutes. This disposition can not be made of the case for the reason that the record shows that there are alleged adverse claims and for the further reason that, as was held in the case of Crosby and Other Lode Claims, *supra*, there has been no substantial compliance with the law, the entry and the proceedings upon which it is based being wholly invalid.

Inasmuch as the conclusion reached above effectually disposes of the present entry, it is unnecessary to discuss the other questions raised by counsel in the argument.

It should be pointed out, however, that from the record before the Department it appears that three homestead entries (Nos. 4723, 4724, and 4931, Las Cruces series) were inadvertently allowed of record in the year following the making of the mineral entry, each one in part in conflict therewith. One of these entries (No. 4724) was a second homestead filing and was allowed by the local officers in the absence of the authorization of your office and of the necessary showing required in cases of second entries. Also against this entry two corroborated protests have been filed, charging the mineral character of portions of the land covered thereby. In this connection attention is directed to the allegations of the numerous affidavits filed on behalf of the company, tending to establish the mineral character of the land embraced within its three placer mining claims. These matters should receive due consideration, and your office will take such action and give such instructions to the local officers as the premises may warrant.

The decision appealed from is accordingly affirmed.

ADDITIONAL HOMESTEAD ENTRIES—SECTION 3, ACT OF APRIL 28, 1904.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 11, 1908.

REGISTERS AND RECEIVERS,
United States Land Offices,

GENTLEMEN: Section 3 of instructions approved July 27, 1907 (36 L. D., 46), is hereby amended to read as follows:

(3) Section 3 of the act of April 28, 1904, forbids the acquisition of title to lands entered under that act through commutation, under the provisions of section 2301 of the Revised Statutes: therefore, if the original homestead entry is commuted, no title will be passed to the entryman for the additional entry until he submits proof in the manner required by the homestead laws, showing that he has resided upon and cultivated the land included in the original entry for a period of five years or that he has resided upon and cultivated the land in the additional entry for such period as added to that of his residence and cultivation of the land in the original entry will make the full period of five years. Entrymen who do not commute the original entry may acquire title to the land in both entries by submission at the proper time, after due notice, of proof of residence on and cultivation of the original entry for a period of five years.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

FRANK PIERCE,
Acting Secretary.

SOLDIERS' ADDITIONAL APPLICATIONS—DO NOT SEGREGATE LAND.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 12, 1908.

REGISTERS AND RECEIVERS,
United States Land Offices,

GENTLEMEN: Soldiers' additional homestead applications do not, prior to their acceptance by this office and the issuance of final certificates thereon, segregate the land involved to such an extent as to prohibit the filing of other applications for such land. Subsequent applications may be received, given their proper serial numbers in accordance with the circular of June 10, 1908 (37 L. D., 46), noted upon your records, and suspended to await final action upon the first application.

When final action is taken upon the soldiers' additional homestead applications, you will immediately take appropriate action, in the order of their receipt in your office, on any intervening applications which may have been filed.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

FRANK PIERCE,

First Assistant Secretary.

TIMBER AND STONE SWORN STATEMENT—DEATH OF APPLICANT—
RIGHTS OF HEIRS.

BURNS *v.* BERGH'S HEIRS.

No such rights are acquired by the mere filing of a timber and stone sworn statement as will upon the death of the applicant prior to notice, proof and payment descend to his heirs.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 14, 1908.* (G. C. R.)

Lucius H. Burns appealed from your decision of March 26, 1908, rejecting his application under acts of June 3, 1878 (20 Stat., 89), and August 4, 1892 (27 Stat., 348), to purchase, and allowing John J. Bergh's heirs to purchase the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 152 N., R. 26 W., Cass Lake, Minnesota.

October 30, 1902, Bergh filed timber and stone sworn statement, which was suspended because the land was, January 27, 1902, withdrawn pending adjudication of Sioux half-breed scrip applications, which suspension was relieved May 19, 1906. July 22, 1904, Bergh died, leaving ten heirs. June 9, 1906, Burns filed his sworn statement, which the local office suspended to await final disposition of Bergh's claim. June 21, 1906, Justus C. Bergh, as administrator of John J.'s estate, applied to perfect his father's claim. This the local office rejected for want of authority therefor. August 28, 1906, Burns submitted his proof, which the local office rejected for conflict with Bergh's application. Both Bergh and Burns appealed. December 25, 1906, you directed the local office to allow Bergh's heirs to perfect their application and April 1, 1907, final certificate issued to them. March 26, 1908, you rejected Burns's application and proof.

The sole question involved is whether any heritable right vests by filing a sworn statement under the timber and stone acts prior to notice, submission of proof, or tender of payment.

It is a general rule that a mere declaratory, or sworn statement, or application to make an entry vests no right in the land. It does not segregate it (*Instructions*, 9 L. D., 335, 337; *State of California v. Nickerson*, 20 L. D., 391). It is only when notice is given, proof submitted, and payment made or tendered that a right vests under the timber and stone acts (*Heirs of William Friend*, 5 L. D., 38, 39).

In other modes of appropriation of public lands right of succession is given by statute to heirs where the original party dies before consummating his claim, in case of settler claimants by Revised Statutes, sections 2269, 2291, 2292. Succession is granted to heirs of a contestant by act of July 26, 1892 (27 Stat., 270); to heirs of timber culture entrymen by act of June 14, 1878 (20 Stat., 113), and to heirs of settlers whose entries were canceled without their fault for land within the Northern Pacific railway grant in Minnesota, by act of June 3, 1896 (29 Stat., 245). Right of succession by heirs is also recognized by the land department in desert-land entries as the necessary sequence to the assignability of such entries and of the fact of actual entry and partial payment made at the time.

A mere application to enter vests no estate and there can be no succession or descent except it be given by the statute to an attempt at such mode of appropriation of public lands. It rests solely in discretion of Congress to make disposal of public lands and to define how rights therein shall be acquired and how and in what cases inchoate rights shall descend. There is no descendible right by mere occupancy (*Buxton v. Traver*, 130 U. S., 232, 235-6). If there is none to a settler still less can there be any to a mere declarant of intent to purchase (*Campbell v. Wade*, 132 U. S., 34). In *Hutchinson Investment Company v. Caldwell* (152 U. S., 65, 70), the court notes that the language of Congress "has not been uniform in the matter of the disposition of the public domain after the death of the principal beneficiary," but it follows as a necessity that there is no heritable right until the principal has acquired right, and so long as the land remains public Congress alone can grant a right of succession, in granting which it can limit it to such persons as it sees fit. In *McCune v. Essig* (199 U. S., 382, 388-9), the court said:

What interest arose in McCune by his entry, who could upon his death fulfil the conditions of settlement and proof and to whom and for whom title would pass depended on laws of the United States. *Bernier v. Bernier*, 147 U. S., 242.

The law of the State is not competent to do this.

The decisions cited by you are not authority for holding that any estate was vested in Bergh by his application or any right thereby acquired heritable by his heirs. *Rosenberg v. Hale's heirs* (9 L. D., 161); *O'Conner v. Hall* (13 L. D., 34), and *Thompson v. Ogden* (14 L. D., 65), were contests against timber-culture entries wherein by successful contest, cancellation of the prior entry was effected and

contestants died before opportunity to exercise the preference right given by act of May 14, 1880 (21 Stat., 140). In all these cases the contestant had filed application for entry in his lifetime and it was held that such application, based on the successful contest gave a right in the land that the heirs were entitled to perfect.

Irwin W. Emery (15 C. L. O., 92) was a decision of your office wherein Edmond H. Emery made a timber and stone application, notice of which was being published when he died, and your office permitted the administrator to complete and perfect the proceeding pending. This decision was based upon that in Tobias Beckner (6 L. D., 134), that under act of May 14, 1880 (21 Stat., 140), the homestead right initiated from date of settlement and under Revised Statutes, section 2291, was heritable and devisable. This was not authority for the decision in Emory's case. There was moreover in that case a notice given and proceedings initiated which clearly distinguished it from the present one and it is unnecessary here to say whether or not such initiate proceedings carried to notice gave a heritable right.

Gasquet *v.* Butler's heirs (28 L. D., 343) was a contest of a desert-land entry made in Butler's lifetime, he having made partial payment. It was held (p. 344) :

The Department is not aware of any law providing for the acquisition of title to public land which does not permit either the widow, heir, devisee, or transferee of a deceased entryman to succeed to his rights and perfect his claim to the land.

There was a valid entry, so that an estate vested in him. The law of the entry made such estate assignable and being assignable it necessarily was descendible if not assigned or devised, for it was recognized by the law as property.

Miller *v.* Robertson (35 L. D., 134) involved an application by Miller for homestead entry. Miller was qualified but his application was suspended pending adjudication of a prior asserted right. Miller vigorously and successfully prosecuted his claim but, against his protest, Robertson was erroneously allowed to make entry. The decision so far as applicable here is to the effect that applications for entry must be disposed of in the order of presentation. No question of right of succession was involved or decided. Had Bergh survived to final disposal of the then pending questions as to Sioux scrip claimants his application, prior to Burns, would have entitled him to entry, but as he died without having obtained entry, in absence of any settlement or contestant's right or proceedings vesting him with right of property in the land made by law descendible to his heirs or other successors, no right survived him.

Your decision is reversed. The cash certificate to Bergh's heirs will be canceled, and if no reason otherwise exists, Burns will be allowed to complete entry under his application.

FOREST LIEU SELECTION—SCHOOL LANDS—TITLE TO BASE LANDS.

F. A. HYDE & Co.

Title does not vest in the State of California under its school grant until the granted sections have been surveyed, and where subsequent to survey of a township in the field but prior to approval of the survey by the Commissioner of the General Land Office the township is withdrawn for forestry purposes, no rights to the school sections therein accrue to the State, and such sections do not therefore constitute a valid base for the selection of lieu lands under the exchange provisions of the act of June 4, 1897.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 16, 1908.* (J. R. W.)

F. A. Hyde and Company, by Joseph W. Gregory, its attorney in fact, appealed from your decisions of March 6, 1903, and September 22, 1903, rejecting selection 3046, your series, under act of June 4, 1897 (30 Stat., 36), for the unsurveyed SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, NE. $\frac{1}{4}$, E. $\frac{1}{2}$, NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 35, and SE. $\frac{1}{4}$, Sec. 34, T. 34 N., R. 7 E., W. M., Seattle, Washington, in lieu of the SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$, Sec. 36, T. 3 N., R. 7 W., S. B. M., in the San Gabriel forest reserve.

The question presented by the case is the validity of the State's title to the base tract relinquished. The township was withdrawn for the San Gabriel forest reserve December 20, 1892 (27 Stat., 1049). The township had been before that time surveyed in the field, and the plat approved by the United States Surveyor-General for California November 13, 1885, but the survey was not satisfactory to you and you withheld your approval. February 17, 1894, you approved the plat of survey and April 2, 1894, it was by your direction filed in the local office.

July 12, 1900, the State sold and patented the land to William R. Hewitt who July 20, 1900, conveyed to F. A. Hyde and Company, incorporate, which July 19, 1900, relinquished to the United States for the purpose in said deed expressed to select public land in lieu thereof under act of June 4, 1897.

March 6, 1903, you held the State of California never had title to the land and none vested in its grantee so that Hyde and Company took no title, relinquished none to the United States, and no base existed for the selection which you rejected. Hyde and Company moved for review which, September 22, 1903, you denied.

The contention is that title passed to the State prior to the reservation and as basis for that claim appellant asserts the land was in fact surveyed prior to the reservation and became surveyed land by approval of the plat by the surveyor-general. To support this contention reliance is placed on the school land grant to California by act of March 3, 1853 (10 Stat., 244), and authority of Water and

Mining Company *v.* Bugbey (96 U. S., 165, 166) and Frasher *v.* O'Connor (115 U. S., 102, 114-5).

Nothing in these decisions contravenes your holding that by reason of non-approval of the plat of survey by the Commissioner of the General Land Office the survey of these lands was not complete December 20, 1892, when reservation was made.

The surveys of which those decisions speak were both made in 1866 (96 U. S., 166; 115 U. S., 110, 111), when it was the practice for the surveyor-general to file one copy of the plat in the local office immediately upon his approval. April 17, 1879, instructions were issued to the surveyors-general that:

Experience has shown that it is often necessary to order suspension of plats of survey in the local land offices and frequently the cancelation of the survey. Filing of the triplicate plats of survey in local land offices has frequently led to complications of title and individual hardships to persons making entries according to such surveys, in cases where it has been necessary to set aside or cancel them. For these reasons, you will not, after receipt of this order, file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved and you officially notified to that effect.

Since that regulation proceedings for survey of public lands have not been regarded as complete, or public lands as surveyed and subject to disposal, until approval of the plat of survey by the Commissioner of the General Land Office. This regulation was recognized in *Tubbs v. Wilhoit* (138 U. S., 134, 144) without criticism or suggestion that it exceeded the powers of the Secretary of the Interior.

The Secretary's power to impose regulations for guidance of his subordinates in the land department to supervise and revise their action is so established by judicial decisions construing the powers conferred on him by statute as not to admit question. *Knight v. U. S. Land Association* (142 U. S., 161, 182); *Michigan Land and Lumber Company v. Rust* (168 U. S., 589, 594).

The former practice was found objectionable, confusing public business and private titles, working injury to persons whose affairs became thereby involved. It was abrogated nearly thirty years ago by new regulations which have stood unannulled by Congress or even criticised by the courts. Since such regulations lands are not surveyed or identified until approval of the plat of survey and filing of the plat by your direction in the local land office.

Section 7 of the act of March 3, 1853, *supra*, provides:

That where . . . the sixteenth and thirty-sixth sections, before the same shall be surveyed . . . may be reserved for public uses . . . other land shall be selected by the proper authorities of the State in lieu thereof.

The law is in words of present grant but is qualified with a power of disposal prior to identification by survey and for indemnity in

such case so that title does not certainly inure to the State until the granted sections are identified by a survey completed and approved by the Commissioner of the General Land Office, or otherwise recognized by the land department as a survey authorizing disposal of public lands. Under a similar grant and indemnity provision in *Heydenfeldt v. Daney Gold etc. Co.* (93 U. S., 634, 640), the court construed a similar act—

to grant to the State *in presenti* a quantity of lands equal in amount to the 16th and 36th sections in each township. Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if, in exercising it the whole or any part of the 16th or 36th section had been disposed of the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified . . . and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interest.

The case was cited with approval in *Minnesota v. Hitchcock* (185 U. S., 373, 400), where, construing the similar grant to Minnesota, the court, referring to a resolution of Congress as bearing upon the grant, says:

We refer to the resolution as an express declaration by Congress that the school sections were not granted to the State absolutely and beyond any further control by Congress or any further action under the general land laws. . . . In other words, the act of admission, with its clause in respect to school lands was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the State. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof.

This is cited with approval in *Wisconsin v. Hitchcock* (201 U. S., 202, 215).

As the reservation of the township to public use was made before completion of the survey by your approval of the plat, the State took no title to the land in place by its grant, and no base existed for the selection by Hyde and Company under the act of June 4, 1897.

Your decision is affirmed.

**HOMESTEAD ENTRY—COMMUTATION—RESIDENCE—SECTION 9, ACT OF
MAY 29, 1908.**

FRANK B. KELLY.

The provisions of section 9 of the act of May 29, 1908, protecting commutation entries where final certificate issued upon proof showing residence for at least eight months within the year immediately preceding the submission of proof, contemplate substantially continuous presence upon the land for an aggregate of eight months during that year.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 21, 1908.* (J. F. T.)

Frank B. Kelly has appealed to the Department from your decision of March 18, 1908, rejecting his commutation proof submitted September 19, 1907, upon his homestead entry made February 27, 1906, for the SE. ¼, Sec. 22, T. 3 N., R. 9 E., Woodward, Oklahoma, land district, because of insufficient residence upon the land.

Upon the proof submitted cash certificate number 6687 was issued to claimant September 30, 1907.

It appears from the record that this entryman has not complied with requirements of the Department as stated in the case of Fred Lidgett (35 L. D., 371).

The provisions of section 9 of the act of May 29, 1908 (35 Stat., 465), do not change the rule as to substantially continuous presence upon the land in cases where it is sought to make commutation proof, as laid down in the Lidgett case, *supra*, and in the case of James A. Hagerty (35 L. D., 252). Substantially continuous presence of eight months during the year is required.

This claimant was absent from his entry October 25, 1906, to April 1, 1907, fully five months of the year immediately preceding the submission of his commutation proof. His case, therefore, does not come within the provisions of said section 9 above cited. You hold the homestead entry intact subject to future compliance with law.

Your decision is affirmed.

**CONFIRMATION—DIRECTION TO INVESTIGATE WITHIN TWO YEARS—
INVESTIGATION AND REPORT SUBSEQUENT TO THAT PERIOD.**

CORA M. BASSETT ET AL.

A direction to a special agent of the land department to investigate an entry, within two years from the issuance of final certificate, followed by an investigation and report by a different special agent after the expiration of the two-year period, is sufficient to prevent the interposition of the bar created by the proviso to section 7 of the act of March 3, 1891, provided the investigation and report are in furtherance of the direction given within the period of limitation and part of the same proceeding.

Assistant Secretary Pierce to the Commissioner of the General Land
(G. W. W.) *Office, September 22, 1908.* (E. F. B.)

In the matter of the appeal of Cora M. Bassett and Laura L. Rowell, mortgagee, from the decision of your office of May 1, 1908, denying their petition to dismiss proceedings against the homestead

entry of Cora M. Bassett, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 12, T. 15 N., R. 3 E., Great Falls, Montana, the Department by its decision of September 4, 1908 (not reported), reversed the decision of your office and held that as no action had been taken against said entry within two years from the date of final certificate (September 4, 1903), the land department had no authority to investigate the validity of the entry after the expiration of said period.

The record as transmitted to the Department by your letter of August 22, 1908, upon which the decision of September 4, 1908, was rendered showed that Special Agent Chadwick had, by letter of July 1, 1904, been directed to investigate this entry, from information obtained from an employee of your office, and that the report of Special Agent Schwartz upon which the hearing was ordered was made after the expiration of two years from date of final certificate. It did not appear, however, that the report of Schwartz was connected with the direction given to Chadwick as a part of the same proceeding, but was an independent proceeding and not in furtherance of the direction given to Chadwick.

With your letter of September 16, 1908, you resubmit the case, stating that owing to inadvertence the complete record was not transmitted and you inclose a copy of a letter from your office to Special Agent Good dated May 29, 1906, and sent through Special Agent Schwartz, chief of field division, calling attention to the fact that no report had been made by Chadwick and directing him (Good) to make investigation and report. It was upon this direction that Special Agent Schwartz had the investigation made that was ordered to be made by Chadwick and his report thereon was therefore taken in furtherance of the direction given to Chadwick.

Any action taken by your office prior to the expiration of two years from the issuance of final certificate, such as listing an entry for investigation with a special agent within two years from date of final certificate which is followed up by report is sufficient to prevent the interposition of the bar created by the statute, although the direction was originally given to one agent and the investigation was concluded by another, provided the final report is in furtherance of the direction given within the period of limitation and is part of the same proceeding.

As it now appears that the report of Schwartz was the completion of the investigation directed by your office letter to Chadwick of July 1, 1904, which was sufficient to suspend the running of the statute, your office has authority to order a hearing in said case. The decision of the Department of September 4, 1908, is therefore vacated and set aside and the decision of your office of May 1, 1908, is affirmed.

RELINQUISHMENT—PROCURED THROUGH MISREPRESENTATION
INVALID.

KUNZ v. JOCHIM.

A relinquishment of an entry procured through misrepresentation is invalid.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 22, 1908.* (G. A. W.)

Vinzenz Kunz has appealed from your office decision of June 27, 1908, denying his application to reinstate homestead entry No. 11418, made by him June 19, 1899, for the SE. $\frac{1}{4}$, Sec. 8, T. 132 N., R. 74 W., Bismarck, North Dakota, land district, which entry was canceled, upon relinquishment executed by Kunz, December 1, 1905. On the same day, Michael Jochim filed application to make a second homestead entry for the land under the act of April 28, 1904 (33 Stat., 527), which was allowed. October 1, 1906, Jochim's entry was recorded as No. 36370.

In an affidavit accompanying his application for reinstatement, Kunz, who is nearly seventy years of age, alleges that he is a native-born Russian, of German extraction, and head of a family consisting of a wife and ten children, five of whom are under parental care; that he is unable to speak, read or write the English language; that at the time of making entry of the land (June 19, 1899) he was living thereon with his family, and had been so living since some time in the spring of 1898, since which year "he has cultivated the land or part and portion thereof beginning the first year, when about fifty acres of broken land;" that prior [once elsewhere in the affidavit he says *subsequent*] to making settlement on said land in 1898, he made an application for homestead entry of said land, but that "on account of the destruction of the United States land office, as affiant was informed, the papers in his case were lost and destroyed. That he did not learn of the alleged destruction of his application papers until sometime in the spring of 1899, when he made the first above described application and received the receiver's receipt for the same;" that he had since built a sod house 28 by 50 feet in size, dug a well thirty feet in depth, constructed a barn 40 by 50 feet (later removed from the land), and cultivated about 130 acres; that "sometime before 1904 and subsequent thereto" the surrounding lands were acquired by one Fred Beecher, a large stockman, and Kunz, in order to obtain a range for his stock, "about that time" purchased a quarter-section of land in Sec. 27, T. 133 N., to which place he removed his barn and livestock, "and with it his domicile, but still retained the old homestead and his interests therein, cultivating the said land, and with his family or some members of his family

during spring work, summer and harvest seasons actually lived upon and inhabited the said premises."

In August or September of 1905, Kunz had an altercation with one Walter Steele, foreman of Fred Beecher, whom he killed. For this he was convicted of murder in the second degree and sentenced to the penitentiary. Kunz alleges that the killing was in self defense. After serving a little over two years of his sentence, through executive clemency he received a pardon. He states that while confined in the penitentiary he was visited by his wife and her brother, Michael Jochim, who represented to him that, "affiant subsequent to his incarceration having given notice of proof in support of his homestead, owing to his conviction the said homestead could not be perfected by him, that the same would be lost to him and become subject to contest, advising him to relinquish the entry so that his brother-in-law, the said Michael Jochim, might make entry thereof; that owing to his distressed condition of mind at the time, lack of personal knowledge, inability to read English, and in the absence of legal advice, he yielded to the persuasions of his brother-in-law, said Jochim, and signed a relinquishment of his entry, without consideration of any kind, and delivered the same to Jochim, who presented it to the local officers at Bismarck, together with his (Jochim's) application to make a second homestead entry, which application was later allowed, and Jochim made homestead entry No. 36370 of the lands; that Jochim established residence, but has done nothing to improve or cultivate the land, all cultivation being the work of Kunz's family, Jochim demanding and receiving a yearly rental of one-fifth of the produce of the farm.

Accepting as true Kunz's statement in his affidavit that he established residence upon the land involved in the spring of 1898, and resided there continuously with his family until 1903 or 1904, cultivating the land meanwhile, it appears that he was entitled to make final proof prior to the time he alleges he made his domicile elsewhere and before he had the altercation with the ranchman's foreman which resulted in his imprisonment in the State penitentiary. Furthermore, it is not established that he was not maintaining a *bona fide* residence upon the land as late as June 19, 1904, five years from date of making homestead entry. In any event, a *prima facie* case of maintenance of residence for the required period is shown.

The Department has repeatedly held that, after establishment of residence, an entryman's absence from the land due to judicial compulsion does not render the entry liable to contest on the ground of abandonment. (Anderson v. Anderson, 5 L. D., 6; Kane et al v. Devine, 7 L. D., 532; Arnold v. Cooley, 10 L. D., 551; Reedhead v. Hauenstine, 15 L. D., 554; Williams v. Block, 26 L. D., 416.) Kunz's

entry was, therefore, safe from contest on this ground. It further appears from the record that his family continued to reside upon and cultivate the land during the period of his incarceration, so that the entry could not have been canceled for failure to maintain cultivation.

In his argument filed in support of Kunz's appeal from your office decision, the attorney for Kunz states that Jochim was "willing to sell and dispose of title to this land to this selfsame Kunz for \$2000," and that Kunz appears to regard the land as worth that much to him. As before stated, Kunz alleges in his affidavit that he executed the relinquishment of his entry without any consideration whatsoever.

The evidence considered, the Department is of opinion that Kunz relinquished his entry from misapprehension of his rights, under circumstances clearly suggestive of undue influence, and as the result of misrepresentation made by Jochim, the beneficiary of the relinquishment.

In a number of cases the Department has held that a relinquishment must be intentionally and voluntarily made, and that where obtained as the result of misrepresentation, deceit, duress or undue influence, it is invalid. (*Ficker v. Murphy*, 2 L. D., 135; *Smyth v. Laring*, 3 L. D., 376; *St. P., M. & M. Ry. Co. v. Carlson*, 4 L. D., 281; *O'Brien v. Richtarik*, 8 L. D., 192; *Kerr v. Kelly*, 25 L. D., 197.) None of the above cases was one of pure misrepresentation in the legal sense of that term, unmixed with either fraud, deceit, duress or undue influence, but it is apprehended that since misrepresentation is one of the recognized causes of "unreality of consent," it is an invalidating cause as truly as fraud or undue influence.

The case is therefore returned to your office with directions that a hearing be had, with a view to determining the question of Kunz's maintenance of residence upon the land for the required period, and to ascertain the facts and circumstances regarding the relinquishment executed by Kunz. Upon receipt of the testimony adduced at such hearing, you will take such action as the facts developed warrant.

The decision appealed from is modified in accordance with the views above expressed.

HOMESTEAD-KINKAID ACT-FORMER ENTRY-QUALIFICATION.

DRYER *v.* WALLACE.

A former homestead entry outside of the territory described in the act of April 28, 1904, commonly known as the Kinkaid Act, is no bar to an entry under the provisions of that act of a tract which, together with the land in the former entry, shall not exceed 640 acres.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 23, 1908.* (E. O. P.)

Laura J. Wallace has appealed to the Department from your office decision of February 27, 1908, holding for cancellation her homestead entry allowed May 6, 1907, as to the E. $\frac{1}{2}$ E. $\frac{1}{2}$, Sec. 20, W. $\frac{1}{2}$ W. $\frac{1}{2}$, Sec. 21, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 28, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 29, T. 35 N., R. 56 W., 6th P. M., Alliance land district, Nebraska, in the event Frank W. Dryer made application and established his qualifications to enter said tracts within thirty days from notice of your decision. The entry of Wallace, in addition to the tracts described, embraced the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, and the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 29, which tracts she was allowed to retain if she so desired.

The record discloses that one Jasper Geib made homestead entry October 11, 1904, of the same land as that included in the entry of Wallace. Against this entry Dryer instituted contest April 6, 1907, and on the same date notice issued setting June 6, 1907, as the date of the hearing. The local officers failed to note the contest on their records. May 6, 1907, Wallace filed the relinquishment of Geib, which had been in her possession since the early spring of 1907, and was erroneously allowed to make the entry now held for cancellation. May 28, 1907, Dryer filed a protest against the entry of Wallace alleging that he was entitled to a preferred right to enter the land by reason of his contest. Wallace was called upon to show cause why her entry should not be canceled and Dryer allowed to exercise his preference right. A hearing was had and testimony introduced to show that Dryer was disqualified to make homestead entry by reason of his ownership of more than 160 acres of land. It was incidentally developed that he had previously made homestead entry in South Dakota of 160 acres, which entry he had perfected, but it was not shown that he was the owner of more than 160 acres of land, exclusive of that embraced in his former entry. He was not therefore disqualified to make entry in the exercise of his preferred right, which does not appear to be questioned upon any other ground, unless the making of a homestead entry *outside* the territory described in the act of April 28, 1904. (33 Stat., 547), operates to disqualify him.

Your office held that the first proviso of section 3 of the act of April 28, 1904, *supra*, removed the bar to Dryer's right to enter land within the prescribed area which otherwise would have resulted from the making of his former entry.

As the other matters urged in support of the appeal present no valid ground for denying Dryer the right to make homestead entry, it only remains for the Department to determine whether or not your

construction of the language of the first proviso to said section 3 is correct. Said proviso reads as follows:

That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed six hundred and forty acres.

Unless the scope of this proviso is limited by the language of the other portions of the act it must be construed according to its terms.

It may be contended and also admitted that the statute is local in its application. The first section of the act enlarges the homestead privilege by permitting entry within the prescribed area of 640 acres, except as to lands susceptible of irrigation. The second section, aided by the second proviso to the third section, restores the homestead right to those persons who have made a former entry "within the territory" described, who own and occupy the land embraced therein and authorizes its exercise upon land contiguous thereto, at the same time fortifying the right by subjecting the land subject to its exercise to the claim of the person entitled for a period of ninety days from the passage of the act. This section is complete in itself and the noticeable difference between it and section 1 results from its *strictly* local character. Both the *land* subject to entry under and the *class* entitled to claim the benefits of section 2 are by the very terms of the section limited, while section 1 limits only the *area* within which the right granted may be exercised, leaving the definition of the *class* entitled to the provisions of the general homestead law. As before stated section 2 of the act is complete in itself and there was no necessity for any further provision that a "former homestead entry shall be no bar" to the right to proceed thereunder. Indeed the enjoyment of the benefits of said section 2 depended solely upon the making of a former entry. It is clear therefore the first proviso to section 3 was not intended to operate upon the second section of the act. Nor will any accepted rule of construction warrant giving to an unrelated proviso a limited operation simply because an independent section of the same act contains a restrictive provision. Yet to so construe the first proviso of section 3 as to limit the removal of the bar therein mentioned in those cases only where it grew out of a prior entry made *within the limits* defined by section 1 of the act, the words of section 2, "within the territory above described," must of necessity be understood as therein repeated. If the proviso in question be considered as though section two of the act had never been enacted; and as the said proviso is not related thereto it may for the purpose of ascertaining the true rule of construction be eliminated, could there be any room for doubt as to its meaning? Bearing in mind that the provisions of section 1 are local in character *only in so far* as they prescribe the *territory* within which the extended homestead privilege may be

exercised, while preserving the general character of the *class* entitled to exercise that privilege, the effect of the proviso is to limit the operation of said section which otherwise would exclude from participation in its benefits those persons who had made a "*former homestead entry*." Congress having in clear and unmistakable language waived the disqualification arising out of a former homestead entry *wherever made*, would the Department be warranted in refusing to give full effect thereto? The language used is plain and Congress must be presumed to have anticipated its effect. Any other presumption would be as arrogant as it is dangerous. As said by the court in the case of *Lake County v. Rollins* (130 U. S., 662, 670):

Why not assume that the framers of the Constitution and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe.

* * * * *

To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have a right to add to or take from it.

Interpolation of words for the purpose of disclosing the *true meaning* when the language used is *ambiguous* is a practice to be indulged with caution, but where the language used conveys a *clear* meaning, interpolation which changes that meaning or alters the effect of the terms employed is not sanctioned by any established rule of construction. That is legislation. (*McIver et al. v. Ragan et al.*, 2 Wheat., 25, 29; *Priestman v. U. S.*, 4 Dallas, 28, 30; *Sturges v. Crowninshield*, 4 Wheat., 122, 202; *Thornley v. U. S.*, 113 U. S., 310, 315.)

The first proviso *standing alone* is not susceptible of more than one construction. That construction is not inconsistent with nor opposed to anything elsewhere contained in the act. The only possible objection to adopting such construction rests upon a supposition that some policy of the homestead law has been transgressed and that Congress intended to impose a limitation it failed to express. Even if this were so, correction of the error is not within the province of the land department. "If there be no saving in a statute, the court cannot add one on equitable grounds" (*Yturbide's Executors v. U. S.*, 22 How., 290). Surely if the court will not add a saving clause to relieve against an apparent inequity, it would decline to impose a condition cutting down a benefit conferred merely because its idea of a principle of public policy might be opposed to the reasonable construction of the statute before it. In such cases the courts uniformly reject any

construction which tends to transgress the legislative function. In the case of *Lessee of French v. Spencer et al.* (21 How., 228, 238) the rule is well stated:

The act of March 5, 1816, has no reference to, or necessary connection with, any other bounty land act; it is plain on its face, and single in its purpose, and, then, what is the rule? One that cannot be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the legislature makes a plain provision, without making any exception, the courts can make none.

But the supposed violation of the policy of the public land system is not supported by language contained in either section one or two of the act, and as the statute is a remedial one we are not at liberty to look beyond its terms to find grounds to sustain such a presumption. The court in *Silver v. Ladd* (7 Wall., 219, 225) stated as a principle that in construing a statute relating to the disposition of the public land any interpretation which "savoured of narrowness or illiberality in defining the class" entitled should be rejected. The proviso here under consideration purports to define only a *class* entitled to the benefits of the act and the same rule applies with equal force to the construction of its terms. Further than this the proviso has heretofore been the subject of departmental consideration, and never has the location of the former entry been treated as a factor having any bearing upon the right of the party to make another entry thereunder. The circular of May 31, 1904 (32 L. D., 670, 671), required that the former entry should have been perfected so far as residence and improvement were concerned, but imposed no condition upon the right based solely upon the location of the land embraced in such entry. The requirement made by said circular as to residence and improvement was later revoked. (David H. Briggs, 34 L. D., 60). In the case of *Arthur J. Abbott*, both on appeal (34 L. D., 502) and review (35 L. D., 206) the Department held that the making of a former homestead entry did not constitute a bar to the enjoyment of the right conferred by the first proviso to said section 3. On appeal it was decided that if the applicant under said proviso was the owner of more than 160 acres of land, even though a portion of it was that embraced in the former entry, he was disqualified by reason of that provision in section 1, requiring that the entries authorized by the act should be made "under the homestead laws." On review, however, it was held that the broad language of said proviso could be given full effect only by eliminating from the calculation in determining the amount of land owned, the area embraced in the former entry. While the question here presented was not there directly in issue yet there is less reason for interpolating in the proviso words necessary to restrict its operation to persons whose former entries were made

within prescribed limits than for refusing to construe as a part thereof general language found in the first section of the act.

Even under the contention that only those who made entries within the area described come within the terms of said proviso, it must be conceded that as to them a new right, and not the enlargement of an old, is created and conferred. Yet there is no basis for the presumption that they have not fully enjoyed and already exhausted the homestead privilege. This is strikingly illustrated in the case of one who had made and relinquished a former entry for a consideration. Certainly such a person is entitled to no more consideration at the hands of Congress because the entry relinquished under such circumstances was made in that portion of Nebraska covered by the act than if made in South Dakota or California.

If a supposed public policy or assumed equity, not based upon anything expressed in a statute, is to control the accepted meaning of its plain terms, then by interpretation the application of this proviso should be further restricted by denying to such persons a right of entry thereunder. Carried to its logical conclusion such a rule would by implication introduce several provisos, one as fully warranted as the other, to the proviso under consideration, the comparative effect of which would be to give little force to the broad terms "shall be no bar" as therein used. To such a length the Department declines to go, but will adhere to its former construction of the proviso giving to its terms their ordinary, accepted and reasonable interpretation.

It not appearing from anything in the record contained that Dryer is disqualified to exercise his preferred right of entry by reason of his ownership of more than 160 acres of land, and his right not being attacked upon any other sufficient ground, the action of your office is hereby affirmed.

HOMESTEAD ENTRY—QUALIFICATION—OWNERSHIP OF LAND—CONVEYANCE.

AUKER *v.* YOUNG.

A transfer of land by an intending homesteader with a view to removing the disqualification resulting from the ownership of more than 160 acres, will not be held effective for that purpose unless actual and in good faith and evidenced by such facts as show that it is not a mere collusive device to evade the law.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, September 23, 1908.* (G. C. R.)

Wilber E. Young appealed from your decision of May 13, 1908, reversing the local office and holding for cancellation his homestead entry for lot 3, Sec. 18, T. 34 N., R. 40 W., Valentine, Nebraska.

November 15, 1904, he made entry under act of April 28, 1904 (33 Stat., 547), giving notice he did not intend thereby to exhaust his right and would apply to enter other contiguous land. November 19, he made additional entry for other land, stated by you to be the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 24, T. 34 N., R. 41 W., Alliance, Nebraska. It is noted the land in section 24 is not contiguous to that in either section 13 or 18, but that point was not made in your decision, and is not involved in the appeal.

In his homestead affidavits he stated that since August 30, 1890, he had not acquired title nor was claiming under the agricultural land laws other than the homestead laws more than one hundred and sixty acres and had not made other homestead entry, except for the SW. $\frac{1}{4}$, Sec. 3, T. 33, R. 41, upon which he made final proof after five years' residence.

May 9, 1907, Hiram I. Aufer filed contest against the entry, charging that Young never established residence on the land entered, and at date of his entry was proprietor of more than one hundred and sixty acres of land in Cherry and Sheridan Counties, Nebraska, and disqualified. After due notice both parties submitted evidence before a notary public. July 17, 1907, the local office found for Young and recommended the contest be dismissed. You reversed that action.

The question of residence on lot 3 was much mooted, but you deemed it not decisive and did not decide it. As to former entries you found that Young, November 24, 1884, made homestead entry for a quarter section, on which final certificate issued October 25, 1890; made timber-culture entry July 8, 1890, for four quarter-quarter subdivisions, on which final certificate issued March 29, 1899; filed declaratory statement December 14, 1890, transmuted October 17, 1891, for three quarter-quarter subdivisions, amended January 24, 1899, to include a fourth forty-acre tract. You held that the first two of these entries, though perfected after act of August 30, 1890, were made prior thereto, and are excluded from consideration of the maximum limit of three hundred and twenty acres allowed by that act, leaving only the pre-emption cash entry of one hundred and sixty acres to be counted, under Instructions, General Circular, January 25, 1904 (p. 79); Instructions (12 L. D., 81). You held he was not disqualified by such former entries.

As to owning other land in excess of one hundred and sixty acres at date of his entry, the evidence disclosed that for several years he had owned and controlled about 1,800 acres, about 1,000 acres of which were near that entered, on which he kept large herds of stock, title to which land was of record in him until long after his entry. In defense to such fact he introduced an unrecorded deed purporting on its face to be acknowledged before a notary public November 2,

1904, whereby he conveyed to his wife, Alice A., nearly all of that standing of record in his name as owner.

But the record shows that Young continued to exercise dominion over the land now claimed to be deeded to his wife, and to hold himself out as owner. April 11, 1905, he deeded a half section to J. S. Hull for \$1,200; June 26, 1905, he mortgaged other of it to the Maverick Loan and Trust Company to secure loan of \$3,000; and September 17, 1906, mortgaged other of it to L. H. Trowbridge to secure debt of \$4,000, in all which instruments he acted as owner and his wife joined as releasing dower.

Other than the immediate parties, Young and his wife, there was no evidence offered to show the actual making and delivery of the deed. Without delivery it could have no effect. The deed on its face purported to be for the consideration of "one dollar and other valuable consideration in hand paid," which they explain as \$339.27, evidenced by a certificate of deposit dated January 21, 1905, of the Sheridan County Bank to Alice A. Young, bearing no indorsement, and stamped by the bank as paid February 18, 1905, which merely imports that it was that day paid to Mrs. Young.

The critical question was the *bona fides* of the deed by Young to his wife. There was no evidence upon the subject but that of the parties. No third party testified to its delivery, or the good faith of the transaction as an actual transfer of title. The testimony of the husband and wife was utterly at variance with their acts from the date of the deed to at least September 17, 1906, nearly two years. You held that these circumstances were sufficient to show that "the whole transaction . . . was a mere pretense and that when he made entry he was the proprietor and owner of nearly 2000 acres of land described in the unrecorded deed," and that the entry was illegal in its inception.

The limitation is imposed by Congress as a measure of public policy to prevent appropriation of land in large areas to privation of others not having homes. The act must be so administered as to effect its purpose in spirit and letter. It was held in *Bickford v. McCloskey* (31 L. D., 166) that the naked legal title held for benefit of another did not disqualify the holder under the act of May 2, 1890 (26 Stat., 81). This was held to be the necessary corollary to the decision in *Gourley v. Countryman* (27 L. D., 702; 28 L. D., 198) that the complete equitable title and right to the legal title disqualify the equitable owner. So in *Patterson v. Millwee* (30 L. D., 370) it was held that legal title to land sold in good faith, held only as security for unpaid purchase money, was not a disqualification. In *Arthur J. Abbott* (34 L. D., 502) it was held that the question of disqualification by ownership of other land is to be determined as of the time of the present application—not as of the original entry to which the

present one is additional. These decisions are harmonious and consistent with the intent and purpose of the act.

Applying the same principle to the phase of the present case, it is clear that a transfer of land by an intending homesteader, made for purpose to evade the law limiting his qualification, must be actual and in good faith, evidenced by such facts as show it is not a mere collusive device. As Young owned the record title at time of his entry, it was incumbent upon him to show the perfect good faith of this transfer. He did not do so. The transaction, if in fact made at its purported date, was secret, he retained power of disposal, and in fact for nearly two years after it continued as reputed owner to sell and to mortgage. The secret deed might at any time be destroyed. That it was in fact ever delivered is not clear. If the deed was actually made and delivered, the subsequent conduct was such as showed he and his wife both regarded the real ownership and beneficial interest to be in him, and his disqualification was therefore not removed. To hold otherwise would be, substantially, to emasculate the statute and render inoperative its wise policy to reserve the public domain for the landless. Otherwise any disqualified person may qualify himself by a secret conveyance without ever in fact divesting himself of the beneficial interest and real ownership.

Your decision is affirmed.

SALE OF LOTS IN FORT SHAW AND SIMMS TOWNSITES, MONTANA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 1, 1908.

REGISTER AND RECEIVER,

Great Falls, Montana.

SIRS: Beginning at your office on October 15, 1908, and continuing thereafter from day to day, Sundays excepted, as long as may be necessary, you will offer for sale at public outcry, for cash, to the highest bidder, at not less than the appraised value thereof, pursuant to the provisions of the acts of Congress approved April 16, and June 27, 1906 (34 Stat., 116 and 519), lots 1 to 8, inclusive, and lots 86 to 110, inclusive, in each of the townsites of Fort Shaw and Simms in the Sun River irrigation project, Montana, according to the approved plats of said townsites. The sale will begin with the lots in Fort Shaw townsite and be followed by the sale of the lots in Simms townsite.

2. *Qualifications and restrictions.*—Any person may purchase any number of lots, if he is the highest bidder for each of them, and no

bidder will be required to show any qualifications as to age, citizenship, or otherwise.

3. *Bids by Agents.*—Bids and payments may be made through agents, as well as in person, but no bid can be made by mail or at any time or place other than the time and place where the lots are offered for sale at public outcry.

4. *Payments and forfeitures.*—If any bidder to whom a lot has been awarded fails to make the required payment therefor to the Receiver before the close of the office on the day the bid was accepted, the right thereafter to make such payment will be deemed forfeited, and the lot will be again offered for sale on the following day, or if the sale of the lots in the townsite in which it is located has been closed, then such lot will be considered as offered and unsold, and all bids thereafter by the defaulting bidder may, in your discretion, be rejected.

5. *Combination among bidders.*—Section 2373, United States Revised Statutes, forbids all combinations in restraint of competition among bidders. In case of any such combination which effectually suppresses competition or prevents the sale of any lot at its reasonable value, or in case of any disturbance which interrupts the orderly progress of the sale, you are authorized to suspend the same for the time being or postpone it to a future day.

6. *Lots offered and unsold.*—Each lot offered and remaining unsold at the close of the sale in each townsite will thereafter become and remain subject to private sale and entry at any time for cash at the appraised value of such lot.

7. *Receipts and certificates.*—When any lot has been sold under these instructions, either at auction or private sale, and the purchase price has been fully paid, the Receiver should issue the proper receipt and the Register issue the usual certificate of entry, giving it the proper serial number. All lots in one townsite purchased at the same time, in the same manner, and by the same person should be included in one certificate, in order to prevent unnecessary multiplicity of patents.

8. *Disposition of moneys.*—All moneys derived from the sale of said lots will be deposited to the credit of the Treasurer of the United States on account of the Reclamation Fund. Monthly abstracts of collections on said sales will be rendered, specifying the particular fund credited.

9. *Compensation.*—The Register and Receiver will be entitled to the commission and fee provided in the second and eighth paragraphs, respectively, of section 2238, United States Revised Statutes. Said commission and fee are not payable by the Receiver acting as special disbursing agent out of the regular appropriations under which advances are made to him, but each officer must transmit to

this office his own claim therefor, which, if approved, will be paid by the Treasury Department out of the Reclamation Fund, under section 3 of the act approved June 27, 1906 (34 Stat., 519).

10. *Notice*.—I herewith transmit a form of notice, approved by the Department, a copy of which you will conspicuously post in your office. Copies thereof, with authorizations for publication of the same, will be sent from this office direct to the newspapers selected for advertising the sale. You will also give such further publicity to the matter as you can without incurring expense.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

FRANK PIERCE,
First Assistant Secretary.

CONFIRMATION—TIMBER AND STONE ENTRIES—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

JAMES A. COBB ET AL.

The proviso to section 7 of the act of March 3, 1891, was not intended to operate as a conveyance springing up at the expiration of two years from the date of the issuance of final certificate, nor as confirming or validating an invalid entry; but merely to limit the time within which proceedings may be instituted before the land department looking to the cancellation of final entries.

Where, therefore, an entry is allowed without authority of law, as in this case for unsurveyed land, the mere lapse of two years after the issuance of final certificate does not have the effect to cure the invalidity.

Timber and stone entries under the act of June 3, 1878, do not come within the purview of the proviso to section 7 of the act of March 3, 1891, and action upon such entries is in no wise affected thereby.

Instructions of June 3, 1904, 33 L. D., 10, revoked.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, October 7, 1908.* (E. O. P.)

A petition for the exercise of its supervisory authority has been filed with the Department in the above-entitled case, and request is made that the timber and stone entry made by James A. Cobb September, 1904, of the unsurveyed SE. $\frac{1}{4}$, Sec. 21, T. 26 S., R. 10 W., Roseburg land district, Oregon, be reinstated and patent issued thereon under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

The entry in question was erroneously allowed by the local officers and was held for cancellation by your office August 15, 1907, more than two years after final certificate had been issued thereon. This

action was affirmed by the Department February 8, 1908 (36 L. D., 268). A motion for review was denied March 28, 1908.

Each of the decisions heretofore rendered is based upon the ground that as the act of June 3, 1878 (20 Stat., 89), under which Cobb attempted to make the entry in question, provides only for the disposition of surveyed lands, and the land department being therefore without authority to dispose of lands not of the class specified by the statute, it had no jurisdiction to allow the timber and stone entry of Cobb and its action was a nullity and the entry and final certificate issued thereon were void. It was then held that section 7 of the act of March 3, 1891, relied upon by Cobb and his transferees, had no application, and the Department declined to issue a patent upon the final certificate, as it would have done had the entry of Cobb been voidable merely and had stood unimpeached for two years after the final certificate issued.

The granting of the petition is opposed now by the Oregon and California Railroad Company upon the ground that the land in question lies within the indemnity limits of its grant and that when surveyed will be subject to selection on account of loss to the grant of lands in place. This the company contends amounts to the assertion of such an adverse claim as will prevent the reinstatement of the Cobb entry.

There is no force in the contention. Until a selection is actually made by the company it has no legal claim to the land and the reinstatement of Cobb's entry would no more prejudice its rights than it would those of an individual qualified to enter the land under other of the public land laws but who has not sought to do so. The mere fact that the company might select the same land when opportunity offers does not invest it with any right or interest in any land which may be subject to selection. If the land were within the place limits of the grant another question would be presented. The protest must, therefore, be dismissed and the petition of Cobb determined on its merits.

It is insisted in his behalf that it is wholly immaterial that the original attempt of Cobb to purchase the land under the timber and stone act or the issuance of final certificate by the local officers may have been void and of no force and effect. In support of this the decision of the Supreme Court rendered April 20, 1908, in the case of *United States v. Chandler-Dunbar Co.* (209 U. S., 447), is relied upon. The decision cited construes the eighth section of the act of March 3, 1891, *supra*, which deals with the confirmation of an outstanding patent against which no attack has been made prior to the expiration of the limitation prescribed for the commencement of proceedings to set it aside. With respect to such patent the holding of the court is in effect substantially as urged by counsel for the pe-

titioners. It does not follow, however, that the same rule governs the construction of that portion of section 7 of the same act directing the issuance of patent in certain cases. That direction is as follows:

That after a lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The Supreme Court in the Chandler-Dunbar case held that inasmuch as section 8 of the act of March 3, 1891, *supra*, in terms purported to confirm the title evidenced by "any patent" the question as to the jurisdiction or authority to issue the patent was of no moment, inasmuch as the United States had authority to dispose of its land in any manner and could adopt any patent, whether void or voidable, as the instrument evidencing the extent of the statutory conveyance. The theory of the court in that case is that said section 8 is in itself in the nature of a grant which becomes operative in favor of persons claiming under a prior patent immediately upon the expiration of the period specified. Such a proposition finds no support in the language of section 7 of the act limiting the time within which proceedings may be instituted looking to the cancellation of final certificates. That section of the act was not intended to operate as a conveyance springing up at the expiration of two years from the date of any final certificate then free from attack, but rather to cut off the right of the land department to inquire into the sufficiency of the matters upon which its action in issuing the certificate was based. Had an absolute conveyance of all the interest in the land described in the final certificate been intended it is inconceivable that Congress would have made the time upon which the vesting of title should depend contingent upon the action of the land department in issuing or withholding the patent. Yet that is clearly the effect of giving to section 7 the same operative effect as a statutory conveyance of an interest in the land as is given by the court to section 8, for by issuing a patent prior to the expiration of two years it is still within the power of the Department to institute proceedings to annul it and restore the land to the United States at any time within six years thereafter, while by withholding the patent for more than two years would vest an absolute title in the holder of the equitable title under the outstanding final certificate. Had Congress intended to give such force to section 7 it would certainly have placed the same limitation upon it as to the time for instituting proceedings to cancel the certificate as is imposed by the terms of section 8 with respect to patents.

In the opinion of the Department section 7 does not have the effect of conveying any interest in the land the equitable title to which is evidenced by a final certificate, but its operation is confined to a restriction upon the jurisdiction of the land department to proceed in the usual manner to cancel such certificates in those cases where *such proceedings are essential to clear the record* of the outstanding claim. In other words, the validity of the conveyance passing the interest of the United States in the land depends upon the particular statute authorizing it and not upon anything contained in section 7 of the act of March 3, 1891, *supra*. If, therefore, there was no such statute any attempted conveyance of the land would be entirely beyond the jurisdiction of the land department and absolutely void (*Smelting Co. v. Kemp*, 104 U. S., 636, 646; *Wright v. Roseberry*, 121 U. S., 488, 519), and no proceedings would be necessary to set aside its abortive action resulting from an attempt to exercise a power it did not possess. Section 7 provides that a patent shall issue only where there has been a final entry. Clearly this means an entry which has some inherent vitality. Unless an entry has some force in law it can have none in fact and one made without legislative authority is of this class and the mere fact that the land department may have erroneously sanctioned it by allowing the same to be placed of record adds no security thereto. Any right or title asserted or claimed under a void entry or patent may be attacked collaterally. Though it is perhaps usual to do so, no affirmative action need be taken by the land department to formally cancel such entries.

It not being denied that the land Cobb attempted to enter is unsurveyed and not subject to disposition under the timber and stone law, he had no such final entry as is contemplated by section 7 of the act of March 3, 1891, *supra*, and the Department is without authority to reinstate said entry with a view to granting the relief asked.

Application is also made for a survey of the land to the end that the initial steps taken by Cobb may be allowed to stand as an entry. Inasmuch as an entry based upon those steps would for the reasons herein stated avail nothing, it is immaterial that the land may be later surveyed. Only after such survey can any valid proceedings be had looking to an entry thereof under the timber and stone law.

This case may, however, be disposed of upon the ground that the proviso to the 7th section of the act of March 3, 1891, does not embrace entries of timber and stone lands under the act of June 3, 1878.

It will be observed that the statute is not general in its application and does not declare that a patent shall issue upon *every entry* after the lapse of two years from the date of final certificate where no contest or protest against the validity of the entry is pending, but it is specific as to the particular classes of entry that are brought under

its provisions. They are entries "under the homestead, timber-culture, desert-land, or preemption laws, or under this act."

As the statute specifically enumerates the particular entries that are to be affected by its provisions, it must, under the established rules of construction, operate as an exclusion of all others that do not come within the descriptive terms mentioned; and as entries under the act of June 3, 1878, are not specifically enumerated as one of the classes of entries coming within its provisions, they must be held to have been excluded therefrom, unless they come within one or the other of the terms "or preemption laws, or under this act."

In a letter of instructions of June 3, 1904 (33 L. D., 10), you were advised that entries under the act of June 3, 1878, are within the intent and operation of the confirmatory provisions of the proviso to the 7th section of the act of March 3, 1891, such right of purchase being construed as a preemption right and as coming within that class of entries.

That construction appears to rest mainly upon authority of the decisions of the Department construing the act of May 14, 1880 (21 Stat., 140), giving preference right of entry to the successful contestant of "any preemption, homestead or timber-culture entry," it being held that the acts of 1880 and 1891 are correlative to each other, relating to the same subject matter, are strictly *in pari materia*, and the terms common to each should receive a like interpretation.

It is apparent that the construction given to the 7th section of the act of March 3, 1891, holding that a purchase of timber and stone lands under the act of June 3, 1878, is the exercise of a preemption right, rests upon grounds equally as tenable, at least, as the interpretation given to the act of May 14, 1880, that desert-land entries are included within the provisions of that act as "preemption" claims.

The ruling last mentioned was made in *Fraser v. Ringgold* (3 L. D., 69), where the act of May 14, 1880, received such a broad and liberal interpretation as to furnish authority for other rulings of the Department, construing the act as embracing within its provisions contests against every entry, location, or selection of public lands, thus practically eliminating from the act the specific terms "any preemption, homestead, or timber-culture entry" and construing it as if it read "any entry."

Such construction was probably deemed admissible because it was supposed to be necessary to secure the aid of informers to prevent the acquisition of title to public lands by fraudulent entries, and that a desert-land entry "ought to be included in such classification as will bring it within the rules of practice relating to contests and administrative investigations, without the necessity of making special rules."

A simple regulation permitting a contestant to file with his contest an application to enter, in event of successful contest, where the entry contested was other than those specifically mentioned in the statute, which application was to be held in suspension to await the result of the contest, would have accomplished the object without resort to a strained construction of the statute bringing within the term "preemption" every application or appropriation of public land.

Every proceeding against an entry of public land is at the instance of the Government, whether it is prosecuted through its accredited agents or with the aid of individual contestants. In virtue of its supervisory authority over the disposal of the public lands, and in fulfillment of its duty to make investigations to determine the validity of an entry, the land department may avail itself of any service in the investigation of an entry, although no right might be acquired by any person by reason of such assistance except such as may inure to the public generally in the restoration of public lands to entry. (John N. Dickerson, 33 L. D., 498; 35 L. D., 67; *Milroy v. Jones*, 36 L. D., 438.)

Special statutory authority is not required to authorize the exercise of such power. It is vested there by the general power of supervision conferred in the organic act. (*Knight v. Land Association*, 142 U. S., 161.) While the Department may not by regulation withhold lands from entry by the public in favor of a contestant, except in cases where it is expressly authorized by statute, this in nowise affects its power by regulation to provide for disposal of applications proffered for the public lands, and the change herein made as to the scope of the word "preemption" will not deprive the land department of the aid of contestants in detecting and preventing fraudulent or forfeited entries of the public lands.

As before stated the construction given to the act of March 3, 1891, in the letter of June 3, 1904, rested mainly upon the decisions of the Department construing the act of May 14, 1880. One authority was cited (*A. J. Wolf*, 29 L. D., 525) which involved the question as to whether a graduated cash entry made in 1857, and proceeded against in 1858, upon which no subsequent action was taken until 1895, was confirmed by the act of March 3, 1891. It was held that the entry came within the operation of the act.

In that case, as in the case of *Henry v. Pevoto* (29 L. D., 423), cited in the decision, the Department could properly have interposed an equitable bar and issued a patent independently of the act of March 3, 1891.

The 2d section of the graduation act of August 4, 1854 (10 Stat., 574), gave to occupants and settlers on lands affected by said act a preemption right of purchase at the graduated price, subject to the terms, conditions, restrictions, and limitations prescribed in the pre-

emption law, and if the entry was made under that section it was the exercise of a preemption right. But the purpose of the act was to reduce the price of public land graduated by the period for which they had been in market remaining unsold, and although a purchaser of any land subject to sale at the graduated price was required to make affidavit that he intended to buy it for his own use and for the purpose of cultivation, it was not a preemption right but a purchase at private cash entry, subject to the conditions and limitations expressed in the act.

A preemption right in its general sense is the right or privilege of purchasing before others. Under the preemption laws it is a right based on settlement, inhabitancy, and cultivation to purchase by legal subdivision a limited quantity of public lands by subscribing to the statutory oath. In any event, whether the term "or preemption laws" as used in the act of March 3, 1891, is confined strictly to entries that are made under or controlled by the provisions, limitations, and conditions of the general preemption laws, as in the case of entries of Osage, Kansas, and Otoe and Missouri Indian trust lands, or includes every entry made in virtue of a preemption right, a purchase of lands under the act of June 3, 1878, can not be brought within that descriptive term, as it is not in any sense a purchase under a preemption right, which must rest upon some act performed or condition existing securing a right to purchase in preference to others.

Under said act the right is initiated by the application to purchase. Such right is also acquired under the application to purchase at private cash entry. Neither depends upon, nor requires, any right prior to application. One may be acted upon without public notice, the other requires publication of notice, but both are cash entries.

Where the language of a statute is plain there is no room for construction, and where, as in this instance, the particular class of entries to be affected by the statute have been specifically mentioned by terms having a technical and well-defined signification, it must operate to the exclusion of all others unless it is apparent from an examination of the context that it was the purpose of Congress to give to the statute a broader field of operation than is implied from the ordinary signification of those terms.

In the letter of June 3, 1904, entries under the act of June 3, 1878, were brought within the operation of the act of March 3, 1891, for reasons that would apply with equal force to every entry of public lands without reference to the law under which it was made. It was said that the proviso was intended as a statute of repose and to fix a time within which an entry must be attacked and fraud charged. That "it is eminently just and expedient that at some time the validity of an entry of public land should be deemed established by acquiescence of the Government and of interested adverse parties."

If such was the purpose of Congress, why was the operation of the act limited to entries under the four strictly agricultural laws and if it was intended to extend its provisions to all entries of public lands, as a statute of repose, why did it not omit the specific terms—"homestead, timber-culture, desert-land or preemption laws, or under this act?"

There is apparently no reason why receivers' receipts upon the final entry of a tract of land should not receive equal protection without respect to the law under which it was issued, but if the law is unequal the remedy is with the Congress which has for some reason, although it may not be apparent, confined the operation of the statute to agricultural entries, and not to private cash or other entries not specifically mentioned.

It must also be kept in mind that the organic act conferred upon the land department full power and authority to determine as to the validity of every entry of public lands at any time prior to the issuance of patent for the purpose of protecting the rights of the people and to see that "none of the public domain is wasted or is disposed of to a person not entitled to it." *Knight v. Land Association* (142 U. S., 161, 181).

The act of March 3, 1891, was not intended to limit that authority except as to the entries specially mentioned, and it must be so construed.

The instructions of June 3, 1904, are revoked.

The petition under consideration is accordingly hereby denied.

OKLAHOMA LANDS—SECOND ENTRY—ACT OF MARCH 3, 1893.

BALLANTYNE *v.* HARMON.

One who made a homestead entry of lands in the Cherokee Outlet under the provisions of the act of March 3, 1893, which he subsequently abandoned, is not entitled to make another entry of any of said lands under the provision of section 13 of the act of March 2, 1889, authorizing second entries, incorporated into the act of March 3, 1893.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, October 10, 1908.* (A. W. P.)

January 21, 1903, Arthur W. Clyde made homestead entry No. 14393 for the NW. $\frac{1}{4}$, Sec. 24, T. 21 N., R. 20 W., Woodward, Oklahoma, land district, which was canceled by your office letter "H" of September 5, 1906, as the result of a contest prosecuted by John H. Harmon.

September 12, 1906, John A. Ballantyne made application to enter the said land, and with his application filed a protest against allowing

Harmon to make entry thereof in the exercise of his preference right. The protest was in the form of an affidavit made on information and belief, and corroborated by said Arthur W. Clyde, whose entry had been canceled as the result of the contest proceeding initiated by Harmon. Therein it was alleged, substantially, that on May 4, 1895, Harmon made homestead entry No. 7009, for the NE. $\frac{1}{4}$, Sec. 21, T. 24 N., R. 15 W., in the Alva, Oklahoma, land district; that said entry was canceled as the result of a contest in 1901; that Harmon abandoned the said land for a valuable consideration, and not because of inability to perfect the title to same; and that Harmon was offering to sell his preference right to enter the land in controversy.

Shortly after receiving notice of the cancellation of Clyde's entry as the result of his contest, to-wit, September 21, 1906, John H. Harmon applied to make second homestead entry, under the act of April 28, 1904 (33 Stat., 527), of said tract in the exercise of his preference right. In a duly corroborated affidavit filed in support thereof Harmon alleged that:

He is the identical person who made homestead entry No. 7009 at Alva, O. T., on May 4, 1895, for NE. $\frac{1}{4}$, Sec. 21, T. 24 N., R. 15 W., I. M.; that after making said entry he again went upon said land, constructed a fair dwelling house thereon about sixteen feet square and established his actual and bona fide residence therein with his family and continued to reside upon said tract until about August, 1898; that during the first season that he occupied said land he had about ten acres of the best of same broken out and planted to cane; that said crop was almost a failure on account of the sandy character of the soil; that at the time of making his said entry the surface of the land was covered with wild growth and sod and from appearances he took it to be fairly good agricultural land, but after turning the sod the soil was extremely sandy; that during each year that he occupied said tract he planted all of the land that he had plowed out in cane and each crop was almost an entire failure by reason of the soil blowing out and drifting on account of the sand; that while residing there he tried for water in five or six different places, selecting the most likely places in his attempts to procure water for stock and domestic purposes; that after going to the depth of about 27 feet he would strike a hard red keel; that it was almost impossible to penetrate same; that he never succeeded in getting sufficient water for domestic and stock purposes but did procure water in very small quantities in several of the places that he tried; that while residing upon said tract he was compelled to cultivate land other than the land entered and he had under lease 160 acres of school land and placed about 60 acres of same under cultivation; that his financial condition became such that he had to dispose of his lease to said school land and after he parted with that it was a matter of impossibility for him to longer remain upon his homestead, as aforesaid, because of his inability to procure water in sufficient quantity and because of the character of the land being too sandy for agricultural purposes, and as aforesaid, he on or about August, 1898, abandoned said tract without relinquishing the same or without receiving any consideration whatever for abandoning the same; that his said entry was finally canceled by contest filed September, 1900, and canceled by Commissioner's letter "H" of July 16, 1901; that at the time he abandoned said land in August, 1898, he moved his dwelling house off, and his stable off, and what

fencing he had put on it off, and disposed of them for a trivial sum not to exceed one-fourth of their original cost, the exact amount he does not remember.

Affiant further alleges that the reason he did not appear and defend his homestead against the contest filed, as aforesaid, was because he did not want the land for the reason that he could not maintain himself thereon on account of the condition above set forth.

Affiant further alleges that while occupying said tract and attempting to maintain himself thereon, all of his time and labor spent upon said land was lost to him; that he never in any manner received any consideration from any source whatever, and that he made a sacrifice by selling and removing from the premises his dwelling house, barn and fencing, and as aforesaid, did not receive over 25 per cent of the first cost.

December 20, 1906, the local officers ordered a hearing on Ballantyne's protest, which was duly had, both parties appearing with a number of witnesses and offering testimony. September 16, 1907, upon a full consideration of the case and an examination of the record, the local officers found that nothing was developed that would warrant the denial of Harmon's application to enter said land; that the testimony submitted clearly proved the truthfulness of his allegations, and, in conclusion, recommended that said application be allowed on the grounds that—

The tract in controversy is a portion of the Cherokee Outlet, which was opened to settlement September 16, 1893, by virtue of the President's proclamation of August 19, 1893 (17 L. D., 225), made pursuant to the act of March 3, 1893 (27 Stat., 612, 642), which act provided that the land should be opened to settlement "in the manner provided in section 13 of the act of Congress approved March 2, 1889." Said section 13 provides—

"Any person having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands."

Upon consideration of the case on Ballantyne's appeal therefrom, your office by decision of April 11, 1908, held that the said act of April 28, 1904, did not repeal or modify the special act of March 3, 1893, *supra*, providing for the entry of lands in the Cherokee Outlet, and that, while from a careful examination of the entire record, which refers largely to the former act, you were not prepared to say that Harmon was not qualified thereunder to make a second entry, yet in the view entertained by your office, it was deemed unnecessary to determine this phase of the matter as you concurred in the holding of the local office as to his right to make such entry under the provisions of the said act of March 3, 1893. Accordingly you approved the recommendation of the local officers, from which decision the appeal of Ballantyne brings the case before the Department for consideration.

While it is not stated in either your decision or the finding of the local officers, yet it is disclosed from an examination of the papers in this case as well as the records of your office, that not only the

tract in question; but the land embraced in Harmon's original homestead entry, were both located in the Cherokee Outlet, opened under the said act of March 3, 1893. Hence, the first question to be determined is whether one having made a homestead entry in accordance with the provisions of that act is thereafter entitled to make a second homestead entry under the proviso thereto. In this connection attention is directed to the fact that the same question was considered by the Department in the case of *Wallace v. Clark* (35 L. D., 622). Clark had made a homestead entry in the Kiowa, Comanche and Apache lands opened to entry by the act of June 6, 1900 (31 Stat., 672), which had the exact provision for the making of a second homestead entry as that embraced in the act of March 3, 1893, *supra*. He subsequently relinquished the same and thereafter applied to make a second homestead entry of lands within that tract.

Considering the same, the Department determined that the expression "under existing laws" had reference to laws existing at the date of the passage of the act, and did not contemplate that said act itself should be embraced within that term; hence, one who had made entry under the act was not thereafter entitled to make a second homestead entry under the provisions relating thereto. It is true that in this case certain questions relating to disputed issues of fact with reference to the charge that Clark had previously made certain entries of land in the Dardanelle, Arkansas, land district, were raised, but in the determination of the case they were not deemed material. In fact it will be observed in unreported departmental decision of March 13, 1908, denying a petition for re-review therein, it was clearly stated that the main question involved was whether Clark, having made an entry under the said act of June 6, 1900, and of land subject to entry thereunder, and having subsequently relinquished the same, could make a second entry by virtue of the provisions of the same act. This question was decided in the negative, it being held that a person could make but one homestead entry thereunder.

In view of this determination of the same question presented in the case at bar, the Department must now hold that Harmon was not entitled to make second homestead entry under the said act of March 3, 1893, he having made a former entry thereunder, and to this extent, therefore, the Department can not join in the concurring conclusions reached by both your office and the local office.

It remains, however, to determine whether Harmon is entitled to make such second homestead entry under the provisions of the act of April 28, 1904, *supra*. The fact is, his application appears to have been made under this act and, as stated in the decision of your office, the testimony offered has reference largely thereto. The question as to whether this act extends to the lands in question has been decided

by the Department in the affirmative, it being held in the case of *Phillips v. Thomas* (37 L. D., 151), that (syllabus) :

Lands in the Cherokee Outlet, opened to homestead settlement and entry by the act of March 3, 1893, are subject to the provisions of the acts of June 5, 1900, and April 28, 1904, relating to second homestead entries.

With this question in view, the Department has very carefully examined the somewhat voluminous record in this case, as well as the duly corroborated affidavit filed by Harmon in support of his said application, from which it appears that, after three years compliance with the requirements of the homestead law with relation to his original homestead entry, he abandoned the same because of the inferior quality of the soil, the almost entire failure to secure any crop during each year's cultivation, and because of his inability to secure any sufficient supply of water for domestic and stock purposes, after making a number of attempts by both digging and driving wells thereon; that at the time he abandoned the land, he did not relinquish his entry thereof, and the only consideration disclosed was that received for his improvements, consisting of a house and fencing, at much less than their cost, and which were subsequently removed therefrom by the party acquiring the same; that after abandoning his said homestead entry, he left that locality and gave no further thought to this entry; that because of such abandonment he made no effort to defend said entry against the contest, nor did he protest against its cancellation. Neither does it appear that he received any consideration for not appearing at the said hearing. The record also discloses that the party who purchased his improvements and thereafter removed them from the land embraced in this entry, was not the party who subsequently secured the cancellation of the same by contest, or the one who thereafter made homestead entry embracing this tract.

It is provided by section 1 of the act of April 28, 1904, *supra*—

That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of an honest mistake as to the character of the land; that he made a bona fide effort to comply with the homestead law and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead laws as though such former entry had not been made.

Upon careful consideration of the entire record herein, as well as the showing made by Harmon, the Department is of the opinion that he comes within the spirit of this act and that he is entitled to relief thereunder. Discussion of the immaterial allegation that he offered to sell his preference right is not deemed necessary. It is therefore directed that upon the payment of the proper fees by him you will direct the local officers to allow his application to make second home-

stead entry for the land in controversy, in which event the application of Ballantyne will be rejected. In the event, however, that he fail to make such entry within thirty days from notice, the local officers will take up for proper consideration the protestant's pending application.

In accordance with the views herein expressed, the concurring judgment of the local office and of your office is affirmed.

NORTHERN PACIFIC SELECTION—SETTLEMENT CLAIM—SECTION 3, ACT
OF MARCH 2, 1899.

FRANK ET AL. *v.* NORTHERN PACIFIC RY. CO.

Land embraced within a bona fide settlement claim is not subject to selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, and a selection allowed for land at the time covered by a subsisting settlement can not stand, notwithstanding the settlement claim may have been subsequently abandoned.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, October 16, 1908.* (G. B. G.)

This is the appeal of Lorin Frank *et al.* from your office decision of February 24, 1908, requiring of them certain amendments to, and due corroboration of, their affidavits of contest filed in support of applications to contest the claim of the Northern Pacific Railway Company to certain described tracts of land situated in T. 7 S., R. 8 W., Portland land district, Oregon, before ordering a hearing thereon.

It appears from your office decision that the west half of this township, wherein said tracts are located, has been surveyed, but that the survey has not been accepted, and that said tracts were selected by the Northern Pacific Railway Company June 6, 1900, per list No. 13, under the provisions of the act of March 2, 1899 (30 Stat., 993).

The parties each allege settlement upon the tract claimed by him on or about March 1, 1900; the making of certain improvements, consisting of a dwelling-house and clearing, and that a large portion of the land in the west half of the strip was occupied by settlers, but that the delay in making and approving the survey, also the inclusion of the land in the Tillamook Forest Reserve by the President's proclamation of March 2, 1907, has tended to discourage the settlers and caused some of them to abandon their claims, but that the claims were not abandoned until after the company selected the lands. Your office holds that the affidavits being wholly uncorroborated as to the alleged settlement upon and improvement of the land, and failing to show that the affiants have since the date of set-

tlement continuously resided thereon, do not offer a sufficient base for a hearing.

The requirement of your office in respect to the corroboration of these affidavits is reasonable. Affidavits of contest should, as a rule, be corroborated and the discretion exercised by your office with respect to the affidavits in question will not be reviewed. But it is contended upon the appeal that to secure a cancellation of the railway company's selections it is not necessary to show that the settlers had maintained a continuous residence upon and claim to the land and that it will be sufficient to show that there was such settlement and residence at the date the selections were made.

Section three of the act of March 2, 1899, *supra*, authorizes the company to select nonmineral public lands, so classified as nonmineral at the time of actual government survey, "not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection." It is the opinion of this Department that if a *bona fide* settlement claim had attached to these lands and was subsisting at the date of the company's proffered selection thereof, the selections can not stand. It is immaterial that the settlement claim may have been subsequently abandoned. If the allegations of these affiants are true then when the selections were made "the land was segregated from the public domain and was not subject to entry by the railway company." *St. Paul, Minneapolis & Manitoba Railway Co. v. Donohue* (210 U. S., 21, 40).

The requirement of your office that these affidavits be amended with respect to the question of continued settlement and improvement will not be insisted upon. The decision appealed from is so far modified and a hearing will be ordered upon due corroboration of said affidavits of contest.

SOLDIERS' ADDITIONAL-REMARriage OF WIDOW-MINOR CHILDREN.

WILLIAM E. MOSES.

Upon the death of a soldier entitled to an additional entry under section 2306,

R. S., leaving a widow and minor children, the additional right, under the provisions of section 2307, R. S., passes to the widow; but if she remarry without exercising the right, it thereupon goes to the minor children, without liability to divestiture in event the widow again become sole.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, October 16, 1908.* (J. R. W.)

William E. Moses appealed from your decision of July 3, 1908, rejecting his application under sections 2306 and 2307 of the United States Revised Statutes, to enter NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 1, T. 8 S., R. 76 W., 6th P. M., Leadville, Colorado.

March 4, 1870, Abraham R. Stark applied for and entered at Iron-ton, Missouri, his original homestead for W. $\frac{1}{2}$ lot 7 (NE. $\frac{1}{4}$), Sec. 4, T. 29 N., R. 8 W., forty acres. As Abraham R. Stark, he enlisted August 12, 1862, at Carlinville, Illinois, in Company I, 122d Regiment, Illinois Volunteer Infantry, and after discharge, April 30, 1863, re-enlisted, August 1, 1864, in Company C, 144 Illinois Volunteer Infantry, and was finally discharged, May 18, 1865. He died March 11, 1876, in Washington County, or Dent County, Missouri, leaving a widow, Sarah Frances, whom he married May 29, 1870, and four children, Robert, William, Mollie, and Ollie, the last two twins, born about two months after his death. The widow remarried September 21, 1882, to Charles Mix, all the children being then minors. On these facts three claims of assignment of additional right are founded, originating in the following chronological order:

Florence A. Coffin, at a date not shown in your decision, located this right on the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, T. 66 N., R. 19 W., 4th P. M., Minnesota, claiming under assignment by J. W. Craven, appointed administrator of Abraham R. Stark's estate by the probate court of Dent County, Missouri, May 25, 1903, in which proceedings Robert, William, Mollie, and Ollie were named as decedent's heirs. The claim was supported by affidavit of Sarah Frances Mix to the fact of her remarriage in 1882, without mention of her divorce, hereinafter mentioned. The entry was approved and patent issued January 27, 1904.

Charles G. Volz, at a date not shown in your decision, located this right on the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 8 S., R. 76 W., 6th P. M., Leadville, Colorado, claiming under assignment by an administrator of Abraham R. Stark's estate appointed by the probate court of Wright County, Missouri, to William E. Moses, who assigned to Volz. This you rejected October 16, 1906.

William E. Moses, about November 14, 1906, located this right on the same land as did Volz, and here involved, claiming under assignment October 30, 1906, by Wilson M. Crawford, attorney-in-fact for Sarah Frances Mix, at one time the soldier's widow, Robert and William, his sons, and Mollie Barker and Ollie Machette, his daughters. With the brief on appeal is a decree of divorce rendered September 22, 1897, by the District Court, Cascade County, Montana, in a suit by Sarah Frances Mix against Charles F. Mix, on personal service, divorcing him, and with the papers are affidavits that she has not since remarried, and affidavits that the soldier died in Washington County, Missouri, possessed of very little property, and no administration was ever taken out in that county on probate of his estate. Before you Moses contended the probate court of Dent County had no jurisdiction, and the assignment to Coffin was void;

that Mrs. Mix, at one time Stark's widow, was in fact the sole beneficiary of Stark's right; that Moses's assignment from her, supported only by way of caution by assignments of all of Stark's children, was the only legal assignment ever made of Stark's right.

You held that, so far as Moses's right stands on assignment by the heirs, "having once sold such right for a valuable consideration, they can not be heard to deny the legality of the proceedings by which they benefited;" that so far as the present claim stands on assignment of Mrs. Mix as the soldier's widow, she is precluded from averring anything contrary to the right she cooperated and aided in establishing on the assignment to Coffin. You rejected Moses's application for entry.

The claim of right by assignment from the widow can not be upheld. The statute, section 2307, R. S., fixes the order and rights of succession to the right granted, by providing that:

In case of the death of any person who would be entitled to a homestead under the provisions of section 2304, his widow, if unmarried, or in case of her death or marriage, his minor orphan children . . . shall be entitled to all the benefits enumerated in this chapter.

In John M. Maher (34 L. D., 342, 344) this section was considered from a somewhat different aspect than the present case. It was there said, as to the additional right:

The right is earned by the soldier and is extended by the legislation in question to other persons only as they stood near to and represent him, passing in the first instance to his widow. But if she remarries or dies without having exercised or disposed of the same, it goes to his minor orphan children. If he has no minor children, or if the right is not exercised or disposed of during their minority, it reverts to his estate. Where by reason of the widow's remarriage the right has passed to the soldier's minor orphan children, or has reverted to his estate, it is at an end so far as the widow, as such, is concerned.

The right is property, and the statute fixing the order of its devolution makes no provision for divestiture of the children for benefit of her who was the soldier's widow in case her second marriage relation terminates, either by death of her second spouse or by divorce. An estate vested in the children will not be divested and revested in the former holder, the at one time widow, unless the statute so provides. Mrs. Mix's divorce did not take from the children the property that had vested in them or revest her with a title that passed from her by her remarriage. The children became sole beneficiaries by her remarriage, without liability to be displaced in right by her in event she again became sole.

The children, having all the right, assigned it through administration of Craven to Coffin for their benefit. It is contended this was void because the administrator was not appointed by the proper probate court. This was mere matter of form. Twenty-seven years

had passed since the soldier's death. His children were necessarily of full age. They made no objection to the form of proceeding. They might have themselves assigned, as they have now assumed to do. Acquiescing in the proceeding for their benefit was equivalent to their own act. Subsequent proceedings by an administrator in strict form of law will not overturn or displace the act of the real beneficiaries previously done. David Werner (32 L. D., 295).

But for other reasons Moses's application must be rejected. There is but one right and that has been recognized and satisfied to the assignee of true beneficiaries acting by Craven to their knowledge, with their acquiescence, and for their use. It is of no moment whatever whether the court appointing him had a technical jurisdiction or not to make such assignment. Like a municipal warrant, or a land warrant, when the claim is once satisfied, as this was by patent of land, the executive power is exhausted. Dillon Municipal Corporations (2d Ed. Sec. 409); Halstead v. Mayor (3 Const. N. Y., 430); Sweet v. Carver (16 Minn., 106); Marvin Hughitt (33 L. D., 544); Andrew M. Turner (34 L. D., 606, 610); C. L. Hood (ib., 610, 613); Anna R. Kean (35 L. D., 87, 89). Your decision is affirmed.

HOMESTEAD—KINKAID ACT—LANDS WITHDRAWN FOR IRRIGATION—
PREFERENCE RIGHT UPON RESTORATION.

INSTRUCTIONS.

Persons who had made homestead entry within the area withdrawn for irrigation purposes under the provisions of section 1 of the act of April 28, 1904, commonly known as the Kinkaid Act, are upon restoration of the withdrawn lands to entry entitled to the preference right to make additional entry granted by section 3 of said act, for a period of thirty days from the date of restoration.

Acting Assistant Commissioner Schwartz to the Register and Receiver, Alliance, Nebraska, October 17, 1908.

I am in receipt of your letter of September 2, 1908, referring to certain lands which have been restored to settlement and entry under the Kinkaid Act, the same having been withdrawn for irrigation purposes under the provisions of the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act.

You ask whether or not persons who had made a homestead entry within said area prior to the date of the said act are entitled to the preference right of entry which was granted by section 3 of the Kinkaid Act, for ninety days after the passage of the act.

Section 1 of the said act of April 28, 1904, reads in part as follows:

Provided, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary

of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.

Second proviso in section 3 of said act reads as follows:

That any former homestead entryman who shall be entitled to an additional entry under section 2 of this act shall have for ninety days after the passage of this act the preferential right to make additional entry as provided in said section.

It will thus be seen that persons who had made homestead entries within the area described in said act, which were withdrawn by this Department for irrigation purposes, were unable to exercise the preference right named in section 3 above quoted because of the withdrawal of the surrounding lands from entry. The act was inoperative until the restoration of said lands to entry, and it would appear that the right to make entry was merely suspended and that the preference right should be given to those who were thus prevented from taking advantage of that provision at the time the act went into effect. While the preferential period mentioned in section 3 of the act is for ninety days after the passage of the act, the act did not take effect so as to allow additional entries until sixty days after the passage of the act. That really limited the preferential period to thirty days. Therefore, it would appear equitable and within the spirit of the language above quoted to hold that such entrymen have a preference right of entry for thirty days after the restoration of the lands to entry. This Department so holds, and you will be governed accordingly.

Approved, November 2, 1908:

FRANK PIERCE,

First Assistant Secretary.

MILITARY BOUNTY LAND WARRANTS—ACT OF AUGUST 31, 1852.

DUNCAN G. MALLOY.

Warrants which at the date of the act of August 31, 1852, had been located, but title under the location not perfected because of laches of the locator or his assignee, were not "unsatisfied and outstanding" within the meaning of that act, and the issuance of scrip in lieu thereof under that act is unauthorized.

Where, however, scrip was issued under that act in lieu of such warrants, which has been in good faith purchased upon faith of the action of the Department certifying to the validity of the right represented thereby, and there are no adverse claims to be affected, the scrip will be recognized in the hands of innocent purchasers.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, October 19, 1908. (G. W. W.) (E. F. B.)

With your letter of September 12, 1908, you transmit the appeal of Duncan G. Malloy from the decision of your office of April 21, 1908, rejecting his location of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 33, T. 6 S., R. 7 E., Gainesville, Florida, made with revolutionary bounty land scrip for forty acres issued by your office October 8, 1904, and approved by the Department in part satisfaction of what is alleged to be the unsatisfied parts of Virginia military bounty land warrants Nos. 8439 and 8440, issued by the State of Virginia March 17, 1837, for 444 $\frac{1}{2}$ acres each to Catherine Knox and Daniel Routt, respectively, daughter and son of Richard Routt, of the Virginia Continental Line.

The authority under which your office assumed to issue the scrip in question is the act of August 31, 1852 (10 Stat., 143), which provided:

That all *unsatisfied, outstanding* military land warrants, or parts of warrants, issued or allowed prior to the first day of March, 1852, by the proper authorities of the Commonwealth of Virginia, for military services performed by the officers and soldiers, seamen or marines, of the Virginia State and Continental Lines in the Army and Navy of the Revolution, may be surrendered to the Secretary of the Interior, who upon being satisfied by the revision of the proofs or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said Commonwealth, for military services so rendered, shall issue land scrip in favor of the present proprietors of any warrant thus surrendered, or the whole or any portion thereof yet unsatisfied.

The act of March 3, 1899 (30 Stat., 1074, 1099), required the owners or holders of such warrants to transfer and surrender them to the Secretary of the Interior within twelve months from the date of said act, "*and all such warrants, or parts of warrants, not so presented and surrendered to the Secretary of the Interior shall be forever barred and invalid.*"

You cite the case of Frank Ellis (35 L. D., 96), which held in effect that warrants that had been located and surveyed at the date of the act of August 31, 1852, were not unsatisfied and outstanding within the meaning of said act.

Two questions are presented by this appeal: first, whether these warrants were "unsatisfied and outstanding" within the meaning of the act of August 31, 1852, and had been presented and surrendered to the Secretary of the Interior within the time limited by the act of March 3, 1899; and, second, whether the issuance of the scrip with the approval of my predecessor in office was an adjudication of matters resting within his jurisdiction, and a determination of such facts as would authorize the issuance of the scrip and protect an innocent holder of the same, or was a mere nullity.

These warrants were entered prior to 1850, at the land office in Chillicothe, Ohio, and were subsequently located on lands within the Virginia Military District in Ohio. Survey No. 15835 was made April 5, 1850, for 750 acres, as part of said entry, in the joint interest of Catherine Knox, who acquired ownership of warrant No. 8440, as legatee under the will of her brother, and of David F. Heaton, to whom she had conveyed an interest in the land. This survey was approved and recorded by the principal surveyor, December 23, 1851, and was returned to the General Land Office April 15, 1852, by D. F. Heaton, deputy surveyor and part owner of the location. A patent was issued thereon April 27, 1871, for 750 acres, in the names of Janet K. Harrison and David F. Heaton jointly, Mrs. Harrison having acquired the right and interest of Catherine Knox as her sole heir.

Surveys were made under said entry for other tracts which were patented to the assignees of the respective rights, but it is unnecessary to make further reference to them, as the pending controversy relates solely to the 750 acres embraced in the patent to Janet K. Harrison and David F. Heaton, and no right issuing therefrom is affected by the other locations.

The title to this land was subsequently acquired by Henry H. Cuppett and David L. Webb, who were ejected therefrom under a judgment rendered in favor of the Board of Trustees of the Ohio State University, the Supreme Court of said State having held that as the survey of said location was not returned to the General Land Office prior to January 1, 1852, the patent issued thereon was void and the title to said land was vested in the State by the act of Congress of February 18, 1871 (16 Stat., 416), granting to the State of Ohio all unsurveyed and unsold lands in the Virginia Military District of Ohio.

Cuppett and Webb thereafter protected their title to the land by procuring a deed from the trustees of said University under the act of said State of March 14, 1889, which authorizes the trustees of the State University to execute and deliver upon demand a deed of conveyance to parties in possession, under claim of title, of any unpatented survey in said Virginia Military District upon complying with certain conditions therein named, and paying the sum of one dollar per acre and two dollars cost for preparing deed.

Cuppett then conveyed to Simon Labold his interest in said warrants, and Labold and Webb as owners of all right to that portion of said warrants No. 8439 and 8440, having obtained a decree of court quieting their title to the same as against all persons holding under the location made therewith, applied for the issuance of scrip in satisfaction of said portion of said warrants under the act of August 31, 1852, which was allowed, and by letter of October 8, 1904, you

submitted for the approval of the Secretary of the Interior, twenty certificates, including the certificate located by Malloy, for 750 acres in the aggregate, being 375 acres for each warrant, which were approved.

The history of the legislation relative to the reservation in the deed of cession of what is known as the Virginia Military District in Ohio for the purpose of satisfying the bounty land warrants issued by the State of Virginia, is contained in the decisions of the Supreme Court in the cases of *Fussell v. Gregg* (113 U. S., 550), and *Coan v. Flagg* (123 U. S., 117), and in the decision of the Department in the case of *Frank Ellis* (35 L. D., 96), to which reference is made. It is sufficient for a clear understanding of the issues involved in this appeal to state that it was not a reservation of the whole tract of country defined in the deed of cession, but only so much of it as may be necessary to make up the deficiency of lands in the country set apart for the officers and soldiers of the continental line, on the southeast side of the Ohio, and the residue was ceded to the United States to be disposed of for the benefit of the several states. Hence it was within the power of Congress to prescribe the time within which such warrants should be located in said territory, so that the Government might be enabled to segregate the lands subject to such claims from the mass of public lands and apply the residue to the other purposes of the trust. *Anderson v. Clark* (1 Pet., 627). In the exercise of this power Congress, by the act of March 23, 1804 (2 Stat., 274), provided that the location of such warrants shall be made and completed within three years from the passage of said act, and where the survey of such locations shall not have been made and returned within the prescribed period, such part of the reserved territory "shall thenceforth be released from any claims for such bounty lands."

The time within which such warrants might be located in said territory was extended from time to time. The act of February 20, 1850 (9 Stat., 421), extended the time to January 1, 1852, and the act of March 3, 1855 (10 Stat., 701), further extended the time two years from the passage of that act.

Then came the act of February 18, 1871, ceding to the State of Ohio the lands remaining unsurveyed and unsold in the Virginia Military District in Ohio. In construing this act the Department held that the cession included all lands that had not been *legally* surveyed, and in order to change that interpretation the act of May 27, 1880, was passed for the purpose of construing and defining the act of February 18, 1871. It declared that "the lands remaining unsurveyed and unsold" had no reference to lands which were included in any survey or entry, and that the true intent and meaning of the act was to cede to the state only such lands as were unappropriated and not included in any survey or entry founded upon said warrants.

The act of August 7, 1882 (22 Stat., 348), was passed for the purpose of further quieting the title to lands in said district based upon location of Virginia military bounty land warrants. It provided that persons in actual possession of such lands under color of title based upon entry of such warrants which was made of record prior to January 1, 1852, whose possession had been continued for twenty years last past under such claim, shall be deemed the true owner thereof, and repealed so much of the act of February 18, 1871, as conflicted therewith.

The Supreme Court, however, in *Fussell v. Gregg*, held that the act of 1855 allowed the holders of such warrants who had made their entries before January 1, 1852, two years further time after the passage of the act "to make and return their surveys. Those who before January 1, 1852, had made both their entries and their surveys, were not within the words or the spirit of the act" (p. 562).

That ruling was re-affirmed in the case of *Coan v. Flagg*, in which it was held that the intent of the act of February 18, 1871, granting the surplus lands to the State of Ohio, was to vest in said State the legal title to all lands in said district which had not at that time been legally surveyed. In that case, as in this, the entry and survey had been made prior to January 1, 1852, but the survey was not returned to the land office until April, 1852.

Adopting the construction given by the Supreme Court of the United States to the acts of February 20, 1850, and March 3, 1855, the Supreme Court of Ohio in the case of *Trustees &c v. Cuppett and Webb* (52 Ohio St., 567), held that as both the entry and survey of the location in question were made prior to January 1, 1852, the return of that survey made subsequent to that date was not validated by the act of March 3, 1855, and hence the patent issued thereon was void; that the interpretation given to the act of May 27, 1880, the act of February 18, 1871, and the confirmatory act of August 7, 1882, could not defeat or affect the title of the State which had been acquired by the grant as to all lands that had not been legally surveyed and returned at the date of the act of cession.

Those decisions are referred to because the judgment of the State courts of Ohio as to the invalidity of the patent issued upon the location of that part of the warrants surveyed for Catherine Knox and D. F. Heaton is relied upon as showing that said portions of the warrants are unsatisfied and outstanding and form the basis of a right to scrip under the act of August 31, 1852, in satisfaction thereof. The courts of Ohio had jurisdiction to determine as to the validity or invalidity of that title, and it is an accepted fact that said title has been declared invalid by such tribunals. They have also jurisdiction to determine as to the ownership of whatever right may remain in said warrants growing out of the proceedings vacating the title to the

land located therewith, but they have no jurisdiction to determine whether those warrants are unsatisfied and outstanding, or to bind the Department by any opinion they may express as to the right of such owners to scrip in satisfaction thereof, nor have they assumed to do so.

The failure of title to the lands located with those warrants was not from any act of omission or commission by the United States or its officers, but was due solely to the laches of the owners of the warrants.

At the time of the passage of the act of August 31, 1852, the portions of said warrants represented by the survey of 750 acres for which patent was issued to Janet K. Harrison and D. F. Heaton were not unsatisfied and outstanding. The survey had then been returned to the General Land Office and that return had been recognized as valid under the act of 1855, as evidenced by the issuance of a patent thereon. It was the misfortune of the owners of the location that the patent was not issued until April 27, 1871, about two months after the passage of the act ceding the unsurveyed and unsold lands in said district to the State, but it is probable that the delay was due to the request of the owners, as it appears from a letter written by Thomas Knox, September 15, 1852, in behalf of his wife Catherine Knox, that the land was valueless, and he asked that a patent be not issued but that he may have permission to withdraw the survey and apply to the general Government for relief.

It can not be questioned that if the patent of the United States had issued upon this entry prior to the grant of the surplus lands to the State of Ohio, it would have conveyed the title. The main purpose of the several acts limiting and extending the time in which locations of such warrants were required to be made and the surveys returned to the General Land Office, was to enable the Government to execute the other purpose of the trust by segregating the appropriated lands and disposing of the residue. The failure to make and return a survey within that period, or to return a survey that had been made, did not, as between the United States and the locator, *ipso facto* discharge the land from the claim founded on such location.

The land was held in trust for the purpose of satisfying those warrants, and while the United States could at any time after the expiration of the period allowed for location have disposed of the surplus lands, it could at any time prior to such disposal have recognized the validity of any location, although the survey had not been returned to the General Land Office within the prescribed period. Such recognition was in fact given to this location.

Hence there is no reasonable ground upon which it can be held that the act of August 31, 1852, recognized warrants that had been so located at the date of said act as unsatisfied and outstanding, or

that it was the intention of Congress to authorize the issuance of scrip in lieu of any warrant that had been located on lands within said district where the failure to perfect title was due to the laches of the locator or his assignee.

At the time of the passage of the act of August 31, 1852, these warrants had in fact been surrendered to the land department, not as unsatisfied and outstanding warrants, but as warrants that had been merged in the location of lands the survey of which had been returned to the General Land Office, and by such location the warrants had, so far as the United States is concerned, been satisfied. They were not then subject to the control of the locator or any one else, and could not be surrendered to the Secretary of the Interior for the purpose contemplated by the act of August 31, 1852, as they had already been surrendered as satisfied warrants and were not outstanding either in a general sense or within the intent or purpose of said act.

The remaining question, whether the locator of the scrip, who purchased it upon faith in the certificate of the Department without notice of its invalidity, is protected as an innocent purchaser, is not free from doubt.

It is a well established principle that the acts of public officials performed without authority are null and void, and that the Government is not bound by the unauthorized exercise of power by its officers and agents. *Hunter v. United States* (5 Pet., 173); *Lee v. Munroe* (7 Cranch, 366). In such cases there is no room for the application of the doctrine that a subsequent *bona fide* purchaser is protected. *Moffat v. United States* (112 U. S., 24). But there is a well recognized distinction between the act of a public official who transcends his power and authority and the merely erroneous act of such official who misjudges in matters that the law confides to his jurisdiction. If he acts without authority it is not the act of the Government, but if his act is within the scope of his authority and power to adjudicate and determine, it is the act of the Government and an innocent party who acts upon such determination is entitled to protection, although the decision may be based upon erroneous findings of fact or a misinterpretation of the law. These are the general rules that control, but in many instances it is difficult to determine between acts that are absolutely void and those that are merely voidable.

The claim of a soldier to bounty land was held by Attorney-General Crittenden (5 Op., 387) to have been fully satisfied by the issuance of one warrant, which exhausted the power and authority of the public official charged with the duty of issuing it; that the issuance of a second warrant upon the same claim can not be regarded as merely

the erroneous act of a public official who misjudges of matters that are left by law within his power and discretion, but is null and void, being beyond the limit of his lawful power.

Later the question was submitted to Attorney-General Cushing (7 Op., 657), for opinion as to whether a land warrant which had been obtained on fraudulent representations and false evidence was entitled to recognition in the hands of an innocent assignee, which was answered in the affirmative.

Concurring in the view expressed in the opinion of Attorney-General Crittenden that where a warrant has lawfully been issued the issuance of a second warrant for the same claim, or of a warrant where there was no one in whom the right and title could vest, is a nullity, Attorney-General Cushing in his opinion distinguishes between such acts and the acts of a public official performed within the scope of his authority. In the examination and determination of the facts upon which his certificate is based, it is said:

He adjudicates officially upon the evidence before him, and decides according to the apparent truth of the case. His determination goes forth to the world as the deliberate and regular act of the United States. Innocent parties, knowing his certificate to be the official act of the Government, proceed accordingly.

See also *Noble v. Union River Logging Co.* (147 U. S., 165).

In *Prosser v. Finn* (208 U. S., 67), it was held that an erroneous interpretation of a statute by the Commissioner of the General Land Office does not change the statute or confer any legal right on one acting in conformity with such interpretation, in opposition to the express terms of the statute.

In that case an entry was made by a special agent of the General Land Office upon authority of a letter of the Commissioner that he was not within the inhibition of section 452, Revised Statutes, prohibiting employees in the General Land Office from making entry of public lands. He continued to comply with the requirements of the statute under which the entry was made, but the entry was subsequently canceled upon a charge that he was disqualified for making such entry, the Department then holding that the Commissioner's interpretation of the statute under which the entry was allowed was erroneous, and the land was subsequently entered and patented to another. In a suit to require the patentee to convey the legal title to the plaintiff, it was held that the rights of plaintiff must be determined by the validity of the original entry and that under the law then in force an employee of the General Land Office could not acquire any interest in public lands that would prevent the land department from cancelling the entry and patenting the land to others.

There is, however, no expression in the opinion denying the authority of the land department to recognize the rights of innocent holders

of scrip who have acquired the same under a misinterpretation of a statute by the land department, if it will not defeat or conflict with rights of others that have been lawfully acquired.

Such rights were recognized and protected by the decision of the Department in the case of Roy McDonald *et al.* (36 L. D., 205), in which it was held that locations of military bounty land warrants and surveyor-generals scrip made under the rulings of the Department then in force construing the act of March 2, 1889, withdrawing all public lands from cash entry except in the State of Missouri, and prior to the subsequent decision of the Department changing that interpretation, shall be recognized and protected where rights were acquired upon faith in the ruling of the Department at the time such locations were made.

The issuance of this scrip was the result, mainly, of a misinterpretation of the statute, but upon the face of the scrip it is shown that the action of the Department was based upon a finding of fact that the warrants had been surrendered pursuant to the act of August 31, 1852, "and that it appeared to the satisfaction of this Department that 375 acres (Richard Routt's warrant) thereof remain unsatisfied." Upon that showing the certificate for forty acres was issued to the person whose name appeared thereon as the owner of said portion of the warrant.

Recognizing the principle that the power and authority of a public official is just what the law makes them, and that it is the duty of the Department to carefully guard against the imposition of frauds upon the Government and not to assume the imposition of any obligation upon it where there is no authority of law, it is also its duty to protect innocent third persons, who have acquired property rights upon faith in the action of the Department certifying to the validity of such right, although it was certified upon insufficient evidence or a misinterpretation of the law, where no adverse claim would be affected thereby. Believing that the holders of this scrip are entitled to such protection if they are innocent purchasers, your decision is reversed and appellant will be allowed to perfect his location if there is no objection that can be urged other than that which appears in your decision.

STATE OF FLORIDA *v.* SANTA FE PACIFIC R. R. Co.

Motion for review of departmental decision of August 22, 1908, 37 L. D., 118, denied by First Assistant Secretary Pierce, October 19, 1908.

AGRICULTURAL COLLEGE SCRIP—CANCELLATION OF ENTRY—TITLE TO SCRIP.

HERBERT M. CARPENTER.

By the cancellation of an entry located with agricultural college scrip the scrip is released and becomes the personal property of the owner of the entry at that time, locatable upon other lands either by the owner or his assignee; and a quit-claim deed executed by such owner subsequent to the cancellation of the entry, purporting to convey all right, title and interest in the land formerly located, is without effect to pass any right or title to the scrip.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, October 20, 1908.* (E. F. B.)

With your letter of October 5, 1908, you transmit for approval agricultural college scrip No. 290, for one quarter section of land, originally issued to the State of Texas, and used by Henry T. Davis January 3, 1872, in payment upon a preemption claim for the NW. $\frac{1}{4}$, Sec. 1, T. 106 N., R. 46 W., New Ulm, Minnesota, which was canceled November 6, 1875, for conflict with the grant to the Southern Minnesota Railroad Company, and the scrip was returned to the local land office for delivery to Davis or his assignee. The land is a part of the Pipestone Quarry Indian reservation, and is still so reserved.

Prior to the cancellation of the entry, Davis sold the land to John T. Averill, who on January 5, 1886, executed a quitclaim deed to the land in favor of Herbert M. Carpenter. It is not shown from the records of the local office whether the scrip was or was not delivered to any one after its return, and it can not now be found among the papers in the local office to which the New Ulm records were removed, and where they now are.

The application for the reissue of the scrip was filed by Herbert M. Carpenter in April, 1905, alleging ownership by reason of his purchase of the land, and submitting proofs in the manner required by the regulations of July 20, 1875 (Copp's P. L. L., 1875), governing the reissue of scrip under the act of June 20, 1874 (18 Stat., 111).

Pertinent to the claim of Carpenter, it may be stated that July 15, 1871, the SW. $\frac{1}{4}$ of said section was purchased by August Cluensen with agricultural college scrip upon a preemption claim, which was patented May 15, 1874, and was delivered to John T. Averill, who had purchased four-fifths of the tract. In 1886 Averill sold his interest in the land to said Carpenter, who afterward bought the remaining interest from Cluensen. A suit was then brought by the United States against Carpenter for the cancellation of the patent, which resulted in a decree in favor of the United States, the court, in *United States v. Carpenter*, 111 U. S., 347, holding that the land

being reserved for the use of Indians was not subject to disposal, and the deed to Cluensen was therefore null and void.

The scrip used in payment of the land entered by Cluensen was returned to Carpenter, upon advice of the Attorney-General, who, by letter of June 25, 1905, held that Carpenter would be entitled to it upon a reconveyance of the land or the entering up of a final decree vacating the patent.

It was apparent in that case that Carpenter was entitled to have the scrip reissued and returned to him upon the failure of his title. At the time of his purchase the scrip had been merged in the entry, which was the foundation of the patent. By his purchase of the land under the patent he acquired all rights growing out of it, and hence all rights that flowed from the subsequent cancellation of the patent.

But in this case the entry had been canceled more than ten years prior to Carpenter's alleged purchase of the land from Averill, of which he was chargeable with notice. By the cancellation of the entry the scrip was released, and became the personal property of the owner of the entry at that time. It was then locatable upon other lands either by the owner or his assignee, and hence the right and title to it did not pass by a mere quitclaim of all right, title, and interest in the land that had formerly been located with it, and from which it had been completely released by the cancellation of the entry.

But even if the showing made by Carpenter be accepted as sufficient proof of his ownership of whatever right and interest Averill acquired under his purchase from the preemptor prior to the cancellation of the entry, there is not sufficient showing that the scrip was not delivered to the person entitled to it during the intervening ten years and more between the cancellation of the entry and the execution by Averill of a quitclaim to the land, nor is there such showing of the loss or destruction of the original as would warrant a reissue of the scrip.

Authority for the issuance of duplicate agricultural land scrip is given by the act of June 20, 1874, *supra*, which extends the provisions of the act of June 23, 1860 (12 Stat., 90), relating to the reissue of bounty land warrants, to include "the reissue of agricultural college scrip lost, canceled, or destroyed without fault of the owner thereof, under such rules and regulations as the Secretary of the Interior may prescribe."

The act of June 23, 1860, authorizing the issuance of duplicate land warrants where the original has been lost or destroyed provides that—

in all cases where warrants have been, or may be, reissued, the original warrant, in whose ever hands it may be, shall be deemed and held to be null and

void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration.

If a duplicate of this scrip is issued, it will have the effect to make null and void the original, in whose ever hands it may be, and to declare that every assignment of such scrip is fraudulent, although such holder may claim under written assignments from Averill who was the owner of the entry at the date of cancellation, unless he establishes by "due proof that the same was executed by the warrantee in good faith and for a valuable consideration."

The records show that upon notice being given of the cancellation of the entry the scrip was returned to the local office December 9, 1875, recertified to Davis, for delivery to the owner. As the original scrip is not to be found in the local office, the presumption is that it was delivered to the party entitled to it, and that presumption is not overcome by the mere fact that the records of the local office are silent as to its delivery.

That presumption is materially strengthened from the fact that no complaints appear to have been made of a failure to return the scrip to the rightful owner, although the entry had been canceled, and the scrip had thereby become the property of Hon. John T. Averill, a member of Congress, who must have been familiar with the law and cognizant of his rights in the premises. The direction written across the face of the location certificate to deliver the patent to him was also authority to deliver to him the scrip upon the cancellation of the entry.

The regulations of July 20, 1875, to carry into effect the provisions of the act of June 20, 1874, provide that steps must be taken as soon after discovery of the loss as practicable. These regulations had been issued about four months prior to the cancellation of Davis's entry, and were then in force. It is unreasonable to believe that no steps would have been taken to secure possession of the scrip or a reissue in place of it, if the local office had failed to deliver it, or it had failed to reach the hands of the owner.

In view of all the circumstances attending this transaction, and from the fact that no steps were taken to secure the scrip or to obtain a reissue until nearly thirty years after the alleged loss or destruction of the original, the Department would not be justified in duplicating the obligation of the Government by the reissue of a duplicate, or in making null and void the original scrip, especially when the applicant has not furnished sufficient proof of his right and title to the same.

The scrip is herewith returned, without approval.

REPAYMENT—ACT OF MARCH 26, 1908.

JAMES H. FEBES.

The act of March 26, 1908, relating to repayment of purchase money and commissions, is merely supplementary to existing law governing repayments, and does not contemplate the reopening of cases properly adjudicated under prior laws, nor authorize repayment in cases where the entry failed of confirmation solely because of the fault or laches of the entryman.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, October 22, 1908.* (C. J. G.)

An appeal has been filed by James H. Febes from the decision of your office of September 10, 1908, denying application for repayment of the purchase money paid by him on desert land entry for the SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 4, T. 11 N., R. 4 W., Helena, Montana.

The entry was made June 25, 1886, and canceled June 28, 1890, for failure to submit final proof. In December, 1903, Febes made application for repayment of the money paid on this entry, which was denied in a letter from your office addressed to Mr. W. E. Moses, attorney, on February 19, 1904, as follows:

Repayment is claimed on the allegation that it was the intention of the entryman to take water from Blacktail Creek (or river) for the reclamation of the land; that shortly after he made his application the question of priority of the rights to take water from said stream was raised, and finally resulted in litigation, which Mr. Febes, on account of financial inability, could not enter into, and in consequence lost all rights to which he may have been entitled, in consequence of which he could not make proof as required.

The petitioner's entry was canceled by office letter "C" June 28, 1890, because of failure to make final proof within the statutory period, and it is clear that the failure of the entryman was due to no fault of the government.

In general circular of 1899, paragraph 10, page 43, it is clearly set forth that persons making desert land entries must acquire a clear right to the use of sufficient water for the purpose of irrigating the whole of the land, and of keeping it permanently irrigated; that a person who makes a desert land entry before he has secured a water right does so at his own risk.

The fact that your client was unable to obtain water to irrigate the land embraced in his entry does not present a case in which repayment is authorized, and said entry having been properly allowed upon the proof presented, for land to which there was no intervening right, his claim does not fall within the provisions of the statute (21 Stat., 287).

The present application is made under the act of March 26, 1908 (35 Stat., 48), section one of which provides:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of fraud or attempted fraud in connection with such application.

The main purpose in view under this legislation is indicated in departmental letter of January 14, 1908, transmitting the original bill to Congress, which reads:

Heretofore and until recently all moneys deposited with applications and proofs for public lands have been retained temporarily by the receivers of public moneys of the United States land offices and finally covered into the Treasury when the entries were allowed or returned by the receivers to the applicants in case their applications and proofs are rejected.

The fact that these moneys accumulated in the hands of the receivers largely in excess of their bonded liability called for a change in this practice, and to safeguard these funds all moneys of this kind are now and will hereafter be covered into the Treasury as soon as they are received.

Under the existing law there is no means of withdrawing any of these moneys from the Treasury for repayment to the persons whose applications and proofs are finally rejected, and I, therefore, herewith submit a proposed bill authorizing their repayment and recommend that it be enacted into law.

In the instructions of April 29, 1908 (36 L. D., 388), under the act of March 26, 1908, it was said:

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes, and to the act of June 16, 1880 (21 Stat., 287).

And referring to section one of the act of March 26, 1908, it was stated in said instructions:

This section refers more particularly to moneys covered into the Treasury of the United States as directed in office circular "M" of May 16, 1907 (35 L. D., 568), and circular letter "M" of July 26, 1907; that is, moneys deposited with proof under the timber and stone, desert land, coal land, and mineral land laws.

It was not the purpose of the act in question to repeal prior laws governing repayments but merely to supplement such laws. While said act may possibly contain in addition to its primary object as set forth in the instructions thereunder, authority for repayment in exceptional cases where the same could not theretofore be made, yet it was clearly not meant to reopen cases properly adjudicated under the prior laws and to authorize repayment in those cases where the entries failed of confirmation solely because of the fault or laches of the entryman.

The action of your office herein denying repayment is hereby affirmed.

NORTHERN PACIFIC RY. CO. ET AL. *v.* STATE OF IDAHO.

Motion for review of departmental decision of July 24, 1908, 37 L. D., 68, denied by First Assistant Secretary Pierce, October 26, 1908.

INSANE ENTRYMAN—ACTUAL RESIDENCE—ACT OF JUNE 8, 1880.

OSTREIM *v.* BYHRE.

The act of June 8, 1880, providing for the confirmation and patenting of claims of settlers under the pre-emption or homestead laws who become insane before the expiration of the time during which residence, cultivation and improvement is required by law, where compliance with legal requirements up to the time of becoming insane is shown, contemplates confirmation only in cases where actual residence has been established and maintained up to the time of becoming insane.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 28, 1908.* (C. J. G.)

An appeal has been filed by Cornelius K. Ostreim from the decision of your office of March 27, 1908, reversing the action of the local officers and dismissing his contest against the homestead entry of Elen J. Byhre for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 29; T. 158 N., R. 94 W., Williston, North Dakota.

The entry was made October 18, 1902, and contest affidavit filed December 20, 1905, alleging, in substance, abandonment and failure to establish or maintain residence on the land. Notice issued January 27, 1906, for hearing on March 26, 1906, before a notary public at White Earth, North Dakota, and final hearing before the local officers on April 2, 1906. Personal service was made upon defendant February 8, 1906, at Church's Ferry, Ramsey county, North Dakota. Upon information that a guardian was appointed February 7, 1906, by the court of Ward county, North Dakota, for defendant, as an incompetent person, new notice was prayed for and granted setting the hearing for June 18, 1906, with final hearing before the local officers June 25, 1906. Personal service was made upon defendant and Anton Skaar, guardian, May 7, 1906. Both parties duly appeared with counsel and witnesses and submitted testimony. The local officers found:

The charge of abandonment stands confessed and it becomes necessary therefore to consider only the evidence touching the defense made thereto; that since March, 1903, the claimant had been of unsound mind, as to which the burden of proof is upon her.

Without going into details with reference to the testimony offered to establish Byhre's alleged insanity, it is noted that the defense endeavored to show that she was in the full enjoyment of her reason at the date of her entry of the land in controversy and that her mind began to fail a few weeks before the law required that she establish residence upon the tract.

The testimony as a whole tends to show that she is a victim of a delusion with reference to her relation with one Jacobson, otherwise she is sane and normal, and it does not appear to have occurred to anyone that she needed a guardian until after the initiation of this contest.

We are therefore of the opinion that the entry should be canceled, and so recommend.

In the course of its decision your office stated:

The testimony in this case shows that the defendant never established and maintained a residence upon said entry; that there had been a small shack built upon the same, which was never furnished; and about ten acres placed under cultivation by the defendant's brother or brother-in-law.

Nevertheless, after referring to some of the testimony, your office concludes:

A preponderance of the testimony shows that the entrywoman has been demented since the month of March, in the year 1903. That having been shown, she is entitled to the benefits of the act of June 8, 1880.

From the evidence it clearly appears, as found by both the local officers and your office, that defendant never established and maintained residence on the land, so that the only question remaining for determination is as to whether or not her case is within the purview of the act of June 8, 1880 (21 Stat., 166), which provides:

That in all cases in which parties who regularly initiated claims to public lands as settlers thereon according to the provisions of the preemption or homestead laws, have become insane or shall hereafter become insane, before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane.

The laws of North Dakota for the appointment of a guardian for an insane and incompetent person seem to confine the inquiry in such matters to the ascertainment and determination of the mental condition of the person at the time the petition for guardianship is filed with the county court. The judge is required to cause the person to be cited, and if, after full hearing and examination, it appears to the court that said person is incapable of taking care of himself and managing his property a guardian must be appointed. Defendant was not in court and no examination as to her mental condition was ever made by the insanity board or commission of the State. The certificate of one A. Flath, M. D., is in the record, stating that defendant "is not of sound mind and has been in need of a guardian for some time past." It is not shown, however, that any effort was made to have the doctor present at the hearing or whether he is a duly authorized and regularly practicing physician. It is in the testimony that he attended defendant three or four times at Church's Ferry, where she had been employed at a hotel since the summer of 1905. It is not claimed that defendant was insane at the time she made entry. It must therefore be accepted that she was mentally compe-

tent at that time and the legal presumption is that she continued so until it is shown to the contrary. The burden, therefore, is upon her or her guardian to make such showing. The proceedings which resulted in placing her under guardianship are not necessarily conclusive in this case. The courts generally hold that a finding of insanity upon an inquisition is merely *prima facie* evidence and is not conclusive in other proceedings. The facts of this case are substantially as follows: Defendant's claim is near or adjoins the home of her brother-in-law and what improvements and cultivation are thereon were made by him. Apparently, after the entry was made the brother-in-law used the land in connection with his own claim while defendant went from place to place and was employed from time to time in various families doing house-work, her last engagement being that of chambermaid at the Orvis House at Church's Ferry, where she was served with notice of contest. Matters seemingly were allowed to drift thus until hearing that she was contested and knowing that she had not complied with law, her brother-in-law, upon advice of his lawyer, seized upon the plea of insanity under which he hoped to save her claim. He had himself appointed her guardian and states that he first noticed indications of insanity in March, 1903, or about the expiration of the six months' period within which she was required to establish residence. Further statements made by him relate to times subsequent to that period. The testimony of other witnesses in behalf of defendant does not relate to a period prior to 1904, and the witnesses of plaintiff appear never to have heard that she was of unsound mind until after this contest was initiated. These witnesses, who had opportunity to observe her mental condition, testify that they saw nothing in her demeanor or conversation to indicate that she was mentally unbalanced. The fact is, the evidence is insufficient to show that she was insane or mentally incompetent in the spring of 1903 and during the six months' period during which she was required to establish residence, whatever may have been her condition in later years. In fact, the testimony is to the effect that she was normal in all things save in the matter of her supposed marriage to one Jacobson. All the testimony, save the indefinite statements of her guardian, is to the effect that she was not insane during the period referred to, and, for that matter, it has not been established that at any time defendant's mind was so affected as to render her incapable of knowing what she was doing or incompetent to attend to her duties. That she was able to and did work is clearly established. The evidence shows the significant fact that she was employed at a hotel under two different proprietors. At no time was she under restraint nor did her relatives exercise supervision over her or contribute to her support. The peculiarities testified to by witnesses, aside from the

delusion or monomania with respect to the man Jacobson, are clearly not indicative of insanity. It is well settled under the authorities that a person may be capable of transacting business of a complicated character and involving the exercise of considerable intellectual power and yet be subject to delusions. In other words, a temporary delusion as to some one subject is not *per se* insanity.

But whether defendant was insane or not, the fact remains that prior to the time she may have become so she had not "regularly initiated" a claim to the land in question as a "settler thereon," in contemplation of the act of 1880. The expressions used in that act, namely: "settlers thereon according to the provisions of the pre-emption or homestead laws;" "residence, cultivation, or improvement of the land claimed by them is required by law to be continued;" "complied in good faith with the legal requirements up to the time of their becoming insane;" all conclusively show the intent of Congress to grant relief only in those cases where actual residence has been established and maintained up to the time of becoming insane. It was held in the case of *Renshaw v. Holcomb* (27 L. D., 131, 132):

The allowance of six months from the date of entry within which to establish or begin residence is a privilege authorized by regulation of the Department, based on section 2297 of the Revised Statutes, and protects the entry from inference of abandonment for six months from entry It is not authority for excusing default in the matter of residence after six months from entry and in the presence of an adverse claim. The regulation of the Department requiring the establishment of residence within six months from the date of entry, is a legal requirement and can not be relaxed.

In the case of *Grindberg v. Campion* (33 L. D., 248), it was said:

Absence caused by sickness may be excused where residence has been established on the land, but before such excuse can be accepted, residence must be established. Where sickness is offered as an excuse for failure to establish residence within six months from the date of entry, it is incumbent on the entryman to show perfect good faith, and such excuse can only be accepted then in the absence of a contest or adverse claim . . . If the defendant could be excused from establishing his residence on the land within six months from the date of entry upon showing his good faith, the burden would be upon him to make such showing.

And in the case of *Johnson v. Heirs of Malone* (35 L. D., 522), it was held:

There can be no constructive residence where actual *bona fide* residence has not been established.

In view of all the circumstances of this case and the law governing the same, the decision of your office is reversed and the action of the local officers affirmed.

MILITARY BOUNTY LAND WARRANT—SUBSTITUTION OF CASH—FINAL CERTIFICATE AND PATENT.

DON P. DICKINSON.

Where one claiming under a military bounty land warrant location is permitted to substitute cash for the warrant, he is not thereby entitled to have patent issue in his name, but final certificate and patent will issue in conformity with the original location under which his title is derived.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, October 29, 1908. (F. W. C.) (E. F. B.)

By decision of June 19, 1908, you allowed Don P. Dickinson to substitute cash payment of \$50 for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 4 S., R. 17 E., Topeka, Kansas, in lieu of military bounty land warrant issued to Andrew Thompson, sergeant, Ohio Volunteers, War of 1812, which was located August 30, 1862, upon said tract by "Hiram Thompson, one of the heirs of Andrew Thompson, deceased."

Exception is taken to that part of your decision requiring the certificate to issue in the name of "Andrew Thompson of Howard County, Indiana, or his heirs, devisees, or assigns," and the case of William R. Borders (34 L. D., 37) is cited in support of appellant's contention that the patent should issue in his name.

In that case the location was made by Francis M. Cross, assignee of Mary G. Brashear, the widow of the warrantee. The location was suspended for want of proof as to whether the warrantee died before the warrant issued, as only in that event would the widow be entitled to the right, free from the claim of the heirs. It was stated that, as the government was not free from fault in neglecting to take proper action upon the case for more than fifty years, equity and justice required that the title should be quieted and the patent should issue without further consideration:

But as he would also, for the same reason, be entitled to have entry upon which the patent issues free from the claim of any unknown heirs of Brashear, no valid reason can be perceived why he should not be allowed to substitute cash for the warrant, so that the patent issued thereon would issue solely to his benefit, free from other claim.

That is, the patent should issue in the name of Cross, the locator from whom Borders claimed title, so that his title would be free from the claim of the heirs.

That is directly what is done in this case. Here the location was suspended for want of sufficient proof as to the death of the warrantee at the time of the location. By the substitution of cash for the warrant the title of the locator is perfected.

The only title Dickinson can acquire by making substitution of cash in lieu of the warrant is derivative—not original. The substi-

tution of cash is the perfecting of the location made by "Hiram Thompson, one of the heirs of Andrew Thompson, deceased," which, as shown by the application, was made "for the use and benefit of the heirs of said Andrew Thompson." Hence, there is no authority for the issuance of a patent, except in conformity with such location, as that is the only source from which Dickinson can derive title to the land, and is the foundation of his title, if he has any.

Your decision is affirmed.

SECOND CONTESTANT—PREFERENCE RIGHT—DISMISSAL OF FIRST
CONTEST—RELINQUISHMENT OF ENTRY.

GILLILAND *v.* FRIZZELL.

Under a second contest suspended to await disposition of a prior contest against the same entry, the second contestant, upon relinquishment of the entry after dismissal of the first contest for want of prosecution, is entitled to a preference right of entry, regardless of the fact that the first contestant was allowed thirty days within which to apply for reinstatement of his contest and within that period filed the entryman's relinquishment accompanied by his application to enter.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, October 29, 1908.* (J. T.)

An appeal has been filed by Claude A. Frizzell from your office decision of March 12, 1908, holding for cancellation his homestead entry, No. 15819, made December 13, 1907, for lot 3, Sec. 3, T. 11 S., R. 23 E., and the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 34, T. 10 S., R. 23 E., W. M., The Dalles, Oregon, land district.

February 2, 1907, David C. Gilliland filed his contest affidavit against the homestead entry, No. 12949, of Alexander Grindstaff, for the land above described, charging abandonment.

March 15, 1907, Claude A. Frizzell filed his affidavit of contest against said homestead entry of Grindstaff, alleging abandonment of said land, and on same day filed an affidavit to obtain service of notice by publication, but action thereon was suspended to await disposition of the Gilliland contest.

March 20, 1907, Gilliland filed his affidavit to obtain service of notice by publication, and May 31, 1907, he was advised by the local office that, as more than sixty days had elapsed since the filing of his said affidavit, it would be necessary for him to file a new affidavit as the basis of such service.

June 25, 1907, Gilliland filed another affidavit to obtain service of notice by publication; and the local office, February 13, 1908, reported that "no proof of publication was ever filed here."

October 11, 1907, the local office dismissed Gilliland's contest for want of prosecution, and notified him thereof, and that he would be allowed thirty days from date of notice in which to apply for reinstatement, and that if he failed to make application therefor within that time, the dismissal of his contest would become final without further notice. Your office decision states that notice of said action was sent by registered mail and received by Gilliland, October 25, 1907. It does not appear that any application was made by Gilliland for reinstatement of his contest.

It appears that Grindstaff's entry was canceled by relinquishment on November 13, 1907; and the register, in his letter of February 13, 1908, reported that the relinquishment was filed at the same time and inclosed in the same letter as the timber and stone application of Gilliland for said land, which application it appears was filed on November 13, 1907.

This application of Gilliland was held in abeyance pending the exercise of the preference right of Frizzell who was allowed to make homestead entry for the land in controversy, December 13, 1907, and Gilliland's timber and stone application was rejected. The local office notified Gilliland of this action by letter of December 16, 1907.

Gilliland appealed, and your office decision, after reviewing the facts, held:

As stated above, Gilliland received notice of the dismissal of the contest, October 25, 1907, and was given thirty days within which to apply for a reinstatement of the same. Within that time he filed the relinquishment of Grindstaff, and also his application to make timber and stone entry. At the time of making said application his rights in the case were not all extinguished, and therefore the relinquishment is presumed to be a result of his contest. There is no evidence on file tending to show that said relinquishment was the result of Frizzell's contest, and therefore Frizzell had no preference rights until after the extinguishment of Gilliland's rights. Frizzell's entry is therefore held for cancellation. Gilliland's application is returned and he will be notified that he will have thirty days within which to perfect the same, in default of which Frizzell's entry will remain intact.

The question involved is whether a second contestant is entitled to a preference right of entry where the contested entry was relinquished after the first contest had been dismissed for want of prosecution and while the second contest was still pending.

If the dismissal of Gilliland's contest was absolute, then it left the second contest (Frizzell's) still pending against the Grindstaff entry.

In the case of *La Bau v. Carroll* (35 L. D., 527), which involved precisely the same principle as is involved in the case at bar, the contest of one Weightman was dismissed for want of prosecution, and he was notified of his right to apply for reinstatement within thirty days. In that case the Department held:

The dismissal of Weightman's contest was not a nisi proceeding but was absolute. It left the entry intact, with no contest pending against it.

The notice given to Weightman under Rule 43, that he would be allowed thirty days within which to file an application for *reinstatement* of his contest, did not have the effect of its own force to revive and continue the pendency of his contest, but merely to suspend action upon any claim or right that might intervene until the contestant had been afforded an opportunity to revive his contest by showing that it had been improvidently dismissed because of his failure to receive notice of the hearing, or that his failure to attend and prosecute his contest was from unavoidable cause.

In view of the decision last cited, it must be held that the dismissal of Gilliland's contest was absolute. At the date of that dismissal the relinquishment of Grindstaff had not been filed. It is the date of the filing that fixes the date of the relinquishment (*Huffman v. Milburn et al.*, 22 L. D., 346). The Grindstaff entry was relinquished in the face of the Frizzell contest, and Frizzell was therefore entitled to every right that a successful contestant may secure by reason of the relinquishment. His right was subject only to the right of Gilliland to show, within the time allowed, that his contest had been improperly dismissed. As no such showing was made, Frizzell's right as a contestant was not affected by the filing of Grindstaff's relinquishment and Gilliland's timber and stone application.

Your office decision is therefore reversed, the entry of Frizzell will remain intact, and Gilliland's application stands rejected.

SCOTFIELD v. OTTERSON.

Petition for re-review of departmental decision of May 14, 1907, not reported, motion for review of which was denied July 23, 1908, 37 L. D., 65, denied by First Assistant Secretary Pierce, October 31, 1908.

HOMESTEAD ENTRY BY INDIAN—TRUST PATENT.

INSTRUCTIONS.

The acts of March 3, 1875, and July 4, 1884, known as the Indian homestead acts, confer upon Indians, as such, who locate or settle upon public lands, or those not living upon a reservation, and who have severed their tribal relations, the right to make homestead entry as fully as citizens of the United States, except that for a certain specified time after the issuance of patent they are deprived of the power to alienate the lands.

By virtue of the provisions of the 6th section of the act of February 8, 1887, every Indian who took an allotment under that act or under any other law or treaty, as well as every native born Indian who takes up his residence separate and apart from his tribe and adopts the habits of civilized life, becomes a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens, including the privilege of making entry under the homestead laws.

Where an Indian entitled under the provisions of the act of 1887 to make homestead entry as a citizen of the United States, makes an Indian homestead entry, upon which a trust patent issues, he may, upon application therefor, have the trust patent canceled and patent under the general homestead law substituted therefor.

Assistant Secretary Wilson to the Commissioner of Indian Affairs,
(G. W. W.) June 2, 1908. (C. J. G.)

The Department has received the communication of your office of April 30, 1908, on the subject of substitution of patents in fee for trust patents issued to Indians under the acts of March 3, 1875 (18 Stat., 402, 420), and July 4, 1884 (23 Stat., 76, 96), known as Indian homestead acts, and recommending vacation of departmental decisions in the cases of Clara Butron (August 31, 1899, unreported), and Jennie Adass *et al.* (35 L. D., 80).

The act of 1875 extends the benefits of the homestead law of May 20, 1862 (12 Stat., 392), to every Indian born in the United States who is the head of a family or who has arrived at the age of 21 years and who has abandoned, or may thereafter abandon, his tribal relations, with the proviso:

That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance, or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor.

The act of 1884 provided that Indians then or thereafter located on public lands might avail themselves of the provisions of the homestead laws as fully and to the same extent as might be done by citizens of the United States and no fees or commissions were to be charged on account of entries or proofs under said laws. It was further provided:

All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow or heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of such period the United States will convey the same by patent to said Indian, or his widow and heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The fourth section of the act of February 8, 1887 (24 Stat., 388), provides, in part, as follows:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in quantities and manner as provided in this act for Indians residing upon reservations; . . .

and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated.

The fifth section provides that upon approval of the allotments made under the act patents shall issue therefor containing restrictions against alienation for the period of twenty-five years, similar to those in the act of 1884. The sixth section reads in part:

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.

This section was amended by the act of May-8, 1906 (34 Stat., 182), as follows:

That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed.

The facts in the case of Clara Butron are that she made homestead entry May 23, 1892, paying the full fees and commissions thereon and stating that she was a native born citizen of the United States, over the age of twenty-one years. It was not made to appear in her application paper that she was of Indian birth or blood and said application was made as in ordinary homestead cases. She submitted final proof in 1897 and at that time testified that she was a "native born Indian woman who has abandoned all tribal relations." The same statement appeared in her final homestead affidavit. A trust patent issued to her in 1898 under the Indian homestead act of July 4, 1884. She returned said patent asking for its cancelation and issuance in lieu thereof of a patent in fee, alleging that she was a native born citizen of the United States and not an Indian woman nor ward of the government. It was further stated that she had resided upon and cultivated the land involved for a period of over seven years and that she then resided upon said land. In reply to the request of the Commissioner of the General Land Office for instructions in the matter, the Department said:

Assuming that the statements of her affidavit in support of her application for a patent in fee are true, there is no doubt that she would be entitled to the issuance of such a patent in lieu of the trust patent which she now surrenders, and which she evidently refuses to accept.

But waiving the consideration of the sufficiency of such evidence to warrant the substitution of a patent in fee for the trust patent issued to her, it is clear that even if her testimony upon final proof were true, and she "is a native born Indian woman who has abandoned all tribal relations," her citizenship results from such condition under the terms of section six of the act of February 8, 1887 (24 Stat., 388, 390).

After referring to the cases of *Turner v. Holliday* (22 L. D., 215), and *Feeley v. Hensley* (27 L. D., 502), the application for substitution of patent was granted, the Department stating:

It appears, therefore, that prior to her entry the applicant was clothed with full citizenship even though she might have been of Indian birth, and that she had the right to make entry of public lands without any restrictions except such as are imposed upon citizens generally.

In the case of *Jennie Adass et al.*, the homestead entry was made August 25, 1887, under the act of March 3, 1875, although the application therefor was endorsed as having been made under the act of July 4, 1884, the applicant stating that she was an Indian, born in the United States, who had abandoned relations with her tribe and adopted the habits and pursuits of civilized life. Departmental decision in that case was based upon the ruling and statements made in the *Clara Butron* decision and cases cited therein, and it was accordingly held (syllabus):

An Indian homesteader holding title under a trust patent issued to him under the provisions of the act of July 4, 1884, who, at the time of making the entry had abandoned his tribal relations and was occupying the status of a citizen of the United States under the terms of section six of the act of February 8, 1887, may, upon application therefor, have the trust patent canceled and patent under the general homestead law substituted therefor.

Your office expresses the opinion with reference to the *Butron* and *Adass* cases, that:

To hold that Indians who made homestead entries under the act of 1884 were authorized by the provisions of the act of 1887 to alienate their lands would be, in effect, to nullify all trust patents issued under the provisions of that act, for lands formerly within an Indian reservation, as well as for lands on the public domain;

and that the act of May 8, 1906—

is the only provision of law whereby an allottee or Indian homestead entryman can be granted a fee simple patent for lands embraced in either an allotment or homestead entry prior to the expiration of the period for which trust patent was issued.

The Department does not concur in these statements and, in fact, they are not in consonance with the ruling in those cases. The principle involved in those cases is this: The benefits and privileges of the acts of 1875 and 1884 are conferred upon Indians as such who locate or settle upon public lands, or those not living upon a reservation. The prerequisite to the enjoyment of such benefits and privi-

leges is a severance of tribal relations. Prior to these acts Indians as such, even though living apart from their tribes, could not make homestead entries. In order to sustain a settlement right in the face of an adverse claim the Indians would have to show that they were citizens of the United States. *Palouse v. Oregon and California R. R. Co.* (20 L. D., 401), and *Levi et al. v. Northern Pacific R. R. Co.* (25 L. D., 478). After the passage of said acts the Indians could exercise the homestead privilege as fully and to the same extent as citizens of the United States but they were forbidden alienation for specified periods. The act of 1887, however, not only declared every Indian to whom an allotment should be made under said act or any law or treaty to be a citizen of the United States, but also declared every native born Indian who had taken up his residence separate and apart from his tribe and adopted the habits of civilized life, to be a citizen of the United States and entitled to all the rights, privileges, and immunities of such citizens, which necessarily included the privilege to make a homestead entry under the provisions of the homestead laws, just as any other citizen.

In the Butron case, notwithstanding application was made under the general homestead law and full fees and commissions were paid, patent with restrictions was issued as on an Indian homestead entry under the act of 1884. This was a mistake and the claimant was clearly entitled, as held, upon showing full compliance with the homestead law, to substitution of patent. This holding was upon the theory, based upon claimant's assertion, that she was a native born citizen of the United States and not an Indian nor a ward of the government. But opinion was further expressed in that case that even though claimant were a native born Indian, yet if she had abandoned all tribal relations she became a citizen under the terms of the sixth section of the act of 1887 and was therefore equally entitled to the relief prayed for. Decision in the Adass case was based upon this view, although in that case entry was applied for and allowed under the Indian homestead laws. The entry in that case was made after the act of 1887 and therefore at a time when it might have been made under the general homestead law. The fact that it was not so made was not regarded as an obstacle, under the view expressed in the Butron decision and cases cited therein, to the substitution of patent upon showing full compliance with the law under which the applicant was clearly entitled to make entry.

It was held in the case of Frank Bergeron (30 L. D., 375), who had been allotted eighty acres of reservation lands under the act of 1887 and was an applicant for an additional eighty acres of the public lands, reference being made to the act of 1884:

This act confers the benefits of the homestead law upon "Indians" as distinguished from "citizens of the United States." This party is now, by virtue

of having been allotted a tract of land, a citizen of the United States and no longer an Indian within the purview of said act, and is therefore not entitled to take a homestead by virtue of its provisions.

It was further stated in that case, however:

Every Indian who has received an allotment of land is a citizen of the United States and every citizen of the United States, having the other prescribed qualifications, is entitled to the benefits of the homestead law. One who becomes a citizen by virtue of having taken his share of the lands of his tribe as an allotment, is as much entitled to the benefits of the homestead law as one who becomes a citizen by any other method.

It was accordingly held that Bergeron was entitled to the benefits of the general homestead law upon establishing his qualifications in the same manner as any other applicant thereunder.

The Butron and Adass cases have sole reference to Indian homesteads and the decisions therein were not intended to and did not affect reservation or fourth section allotments where the Indians only became citizens after and by reason of such allotments. The decision in the case of *Frazee et al. v. Spokane County* (69 Pac. Rep., 779), distinguishes the acts of 1884 and 1887 by saying that the former relates to the acquisition by Indians of title to lands other than reservation lands while the latter deals with allotments of reservation lands only. This decision evidently overlooked the fact that the act of 1887 also provided in the fourth section thereof for allotments to Indians of public lands upon which they may have settled. In that case, too, the Indian homestead entry was made in 1883 under the act of 1875. The act of 1884, which continues the homestead privilege with an enlargement of the time of restriction upon alienation from five to twenty-five years, was invoked against attempted taxation of the land and the court held that no reason appeared why the parties might not avail themselves of the provisions of the act of 1884, they not having at that time earned and perfected title under the act of 1875. That decision in no way affects the principle announced in the Butron and Adass cases, where it is held that as to those Indians who after the act of 1887 made homestead entry under the act of 1884 the trust patents issued to them might be canceled and patents in fee issued instead, on the theory that they have earned title as other citizens, and that they might have in the first instance applied under the general homestead law. This is plainly in accordance with the discretionary and administrative policy governing Indian affairs, and the rule announced in the Butron and Adass cases is not in any manner inconsistent with the continued exercise of supervision over allotments and Indian homestead entries. As said in the case of *Matter of Heff* (197 U. S., 488):

Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the estab-

lishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt.

In the opinion of the Attorney-General of July 27, 1888 (19 Ops., 161), it was said, referring to section six of the act of 1887:

The interesting feature of this legislation is that it marks an epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore.

The provisions of the act of May 8, 1906, *supra*, clearly embrace Indians to whom allotments have been made as such, and not those who by reason of their position have been allowed to make homestead entry as citizens of the United States. It was not intended by the decisions in the Butron and Adass cases that patents in fee should issue in such cases in lieu of homestead trust patents, as matter of right and without any preliminary showing. There should be inquiry to determine whether a proper case for change of patent is made and the recommendation of your office, "that the Commissioner of the General Land Office be directed to refer to this office for investigation all applications for the issuance of patent in fee on Indian homesteads, and final proofs made by Indians under the general homestead law," is hereby approved. The opinion and regulations of June 27, 1899 (28 L. D., 564, 569), relative to fourth section allotments, may very properly, so far as they are applicable, be utilized as a guide in this matter.

A copy of this paper will be sent to the Commissioner of the General Land Office for his information.

KINKAID ACTS—APRIL 28, 1904, MARCH 2, 1907, AND SEC. 7, ACT MAY 29, 1908.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October, 28, 1908.

Registers and Receivers, United States Land Offices.

SIRS: Section 7 of the act of Congress approved May 29, 1908 (35 Stat., 465), amended section 2 of the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act, to read as follows:

SEC. 2. That entrymen under the homestead laws of the United States within the territory above described who own and occupy the lands heretofore entered by them may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not,

with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence continued and improvements made upon the original homestead, subsequent to the making of the additional entry, shall be accepted as equivalent to actual residence and improvements made upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same, except in favor of entrymen entitled to credit for military service.

This amendment did not affect sections 1 and 3 of the Kinkaid Act, which read as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit: Beginning at a point on the boundary line between the States of South Dakota and Nebraska where the first guide meridian west of the sixth principal meridian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the States of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the States of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme length: *Provided*, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.*

SEC. 3. That the fees and commissions on all entries under this act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price. That the commutation provisions of the homestead law shall not apply to entries under this act, and at the time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre included in his entry: *Provided*, That a former homestead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed 640 acres; *Provided*, That any former homestead entryman who shall be entitled to an additional entry under section 2 of this act shall have for ninety days after the passage of this act the preferential right to make additional entry as provided in said section.

All general instructions heretofore issued under that act (32 L. D., 670; 34 L. D., 87 and 546), and the instructions issued under the act of March 2, 1907 (34 Stat., 1224, and 35 L. D., 542), supplemental to the original Kinkaid Act, are hereby modified and reissued as follows:

1. It is directed by the law that in that portion of the State of Nebraska lying west and north of the line described therein, which was marked in red ink upon maps transmitted with said circular, upon and after June 28, 1904, except for such lands as might be thereafter and prior to said date excluded under the proviso contained in the first section thereof, homestead entries may be made for and not to exceed 640 acres, the same to be in as nearly a compact form as possible, and must not in any event exceed 2 miles in extreme length.

2. Under the provisions of the second section, a person who within the described territory has made entry prior to May 29, 1908, under the homestead laws of the United States, and who now owns and occupies the lands theretofore entered by him, and is not otherwise disqualified, may make an additional entry of a quantity of land contiguous to his said homestead entry, which, added to the area of the original entry, shall make an aggregate area not to exceed 640 acres; and he will not be required to reside upon the additional land so entered, but residence continued, and improvements made upon the original homestead entry subsequent to the making of the additional entry will be accepted as equivalent to actual residence and improvements on the land covered by the additional entry. But residence either upon the original homestead or the additional land entered must be continued for the period of five years from the date of the additional entry, except that entrymen may claim and receive credit on that period for the length of their military service, not exceeding four years.

3. A person who has a homestead entry upon which final proof has not been submitted and who makes additional entry under the provisions of section 2 of the act, will be required to submit his final proof on the original entry within the statutory period therefor, and final proof upon the additional entry must also be submitted within the statutory period from date of that entry.

4. Such additional entry must be for contiguous lands and the tracts embraced therein must be in as compact a form as possible, and the extreme length of the combined entries must not in any event exceed 2 miles.

5. In accepting entries under this act compliance with the requirement thereof as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

6. By the first proviso of section 3 any person who made a homestead entry either within the territory above described or elsewhere prior to his application for entry under this act, if no other disqualification exists, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence upon and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries. But the application of one who has an existing entry and seeks to make an additional entry under said proviso, can not be allowed unless he has either abandoned his former entry, or has so perfected his right thereto as to be under no further obligation to reside thereon; and his qualifying status in these and other respects should be clearly set forth in his application.

7. Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

8. Upon final proof, which may be made after five years and within seven years from date of entry, the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre, and such proof must also show residence upon and cultivation of the land for the five-year period as in ordinary homestead entries, but credit for military service may be claimed and given under the supplemental act mentioned above.

9. In the making of final proofs the homestead-proof form will be used, modified when necessary in case of additional entries made under the provisions of section 2.

10. It is provided by section 3 that the fees and commissions on all entries under the act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price, viz: At the time the application is made \$14, and at the time of making final proof \$4, to be payable without regard to the area embraced in the entry.

11. In case that the combined area of the subdivisions selected should, upon applying the rule of approximation thereto, be found to exceed in area the aggregate of 640 acres the entryman will be required to pay the minimum price per acre for the excess in area.

12. Entries under this act are not subject to the commutation provisions of the homestead law.

13. In the second proviso of section 3 entrymen who had made their entries prior to April 28, 1904, were allowed a preferential right for ninety days thereafter to make the additional entry allowed by section 2 of the law.

14. The supplemental act, approved March 2, 1907 (34 Stat., 1224), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all qualified entrymen who, during the period beginning on the twenty-eighth day of April, nineteen hundred and four, and ending on the twenty-eighth day of June, nineteen hundred and four, made homestead entry in the State of Nebraska within the area affected by an act entitled "An act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eight, nineteen hundred and four, shall be entitled to all the benefits of said act as if their entries had been made prior or subsequent to the above-mentioned dates, subject to all existing rights.

SEC. 2. That the benefits of military service in the Army or Navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act, approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions hereof.

SEC. 3. That within the territory described in said act, approved April twenty-eighth, nineteen hundred and four, it shall be lawful for the Secretary of the Interior to order into market and sell under the provisions of the laws providing for the sale of isolated or disconnected tracts or parcels of land any isolated or disconnected tract not exceeding three quarter sections in area: *Provided*, That not more than three quarter sections shall be sold to any one person.

ISOLATED OR DISCONNECTED TRACTS.

15. The sale of isolated tracts within the area affected by the terms of this act is to be governed by the provisions of the act of June 27, 1906 (34 Stat., 517), as amended by section 3 of said act of March 2, 1907, and all sales shall be made in the manner and form hereinafter provided.

16. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

17. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which, when added to the area now applied for, will exceed approximately 480 acres. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

18. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the application are situated.

19. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

20. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands, the area of which, when added to the area applied for, shall exceed approximately 480 acres. No sale will be authorized for more than approximately 480 acres embraced in one application.

21. The local officers will upon receipt of applications note same in pencil upon the tract books of their office and immediately thereafter forward the same to the General Land Office, reporting the status of the land as shown by their records and the existence of any objection to the offering of the lands for sale.

22. An application for sale under these instructions will not segregate the lands from entry or other disposal, but such lands may be entered at any time prior to the time of receipt in the local land office of the letter authorizing such sale. Upon receipt of such letter the local officers will note thereon the time when it was received, and at once examine the records to see whether the lands or any part thereof have been entered. They will note on the tract book opposite such lands as are found to be clear that sale has been authorized, giving date of the letter. Such lands will then be considered segregated for the purpose of the sale. If the examination of the records shows that all of the lands applied for have been entered, the local officers will not promulgate the letter authorizing the sale, but will report the facts to this office, whereupon the letter authorizing the sale will be revoked.

23. The local officers will notify the applicant of the allowance of his application as to the lands found to be clear, describing the tracts which may be sold, and also reporting to this office such tracts embraced in the application as have been entered (if any) prior thereto, whereupon the letter authorizing the sale will be revoked as to the tracts so entered. The applicant will be allowed thirty days from notice of the allowance of his application, in whole or in part, within which to deposit with the receiver an amount of money sufficient to cover the cost of publication of notice, which sum will be returned to

him, provided he is a bidder at the sale but the lands are disposed of to another.

24. When lands are ordered to be offered at public sale, the register and receiver will cause a notice to be published once a week for five consecutive weeks (or thirty consecutive days if a daily paper) immediately preceding day of sale, in a newspaper to be designated by the register as published nearest to the land described in the application, using the form hereinafter given. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The register will require the publisher of the newspaper to file in the local office, prior to the date fixed for sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher accompanied by a copy of the notice published.

25. At the time and place fixed for sale the register or receiver will read the notice of sale, offer each body of land included in the notice separately, and allow all qualified persons present an opportunity to bid. After all bids have been offered the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser and who must immediately deposit the amount bid by him, and, if the highest bidder or bidders be other than the applicant for offering, an amount sufficient to cover the cost of publication of notice, with the receiver, and within ten days thereafter furnish evidence of citizenship, nonmineral and nonsaline affidavit, Form 4-062, and purchaser's affidavit, Form 4-093. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers. They will also, in the event of the sale of the lands to other than the applicant for the offering (the latter being a bidder for the lands), refund to applicant the amount originally deposited by him to cover the cost of publication of notice. Should different tracts included in one notice be sold to several bidders other than the applicant, the cost of publication must be apportioned among them and collected for return to the applicant, as above indicated. If the applicant is the successful bidder for one or more of the tracts offered, the remaining tracts being disposed of to other bidders, the proportionate cost of publication only shall be collected from the successful bidders other than the applicant, for refund to the latter.

26. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private cash entry (act of March 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

27. After each offering where the lands offered are not sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved.

FRANK PIERCE, *Acting Secretary*.

[Form 4-008C.]

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,

_____, 19____.

To the Commissioner of the General Land Office:

The undersigned, whose post-office address is _____ requests that the _____ of section _____, township _____, range _____, be ordered into market and sold under the acts of June 27, 1906 (34 Stats., 517), and March 2, 1907 (34 Stat., 1224), at public auction, all the surrounding lands having been entered or otherwise disposed of. Applicant states that this land contains no salines, coal, or other minerals, and no stone except _____; that there is no _____ (State amount and character.) timber thereon except _____ trees of the _____ species, ranging from _____ inches to _____ feet in diameter, and aggregating about _____ feet stumpage measure, of the estimated value of \$ _____; that the land is not occupied except by _____ of _____ post-office, who occupies and uses it for the purpose of _____, but does not claim the right of occupancy under any of the public land laws; that the land is chiefly valuable for _____ and that applicant desires to purchase same for his own individual use and actual occupation for the purpose of _____ and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 480 acres. The lands heretofore purchased by him under said act are described as follows: _____

If this request is granted, applicant agrees to deposit in advance a sum sufficient to defray cost of publication of notice.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tracts above described? If so, describe the land by section, township, and range.

Answer _____

Question 2. To what use do you intend to put the isolated tracts above described should you purchase same?

Answer _____

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tracts?

Answer _____

Question 4. Have you been requested by anyone to apply for the ordering of the tracts into market? If so, by whom?

Answer _____

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer _____

Question 6. Do you intend to appear at the sale of said tracts if ordered, and bid for same?

Answer _____

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the lands for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer _____

(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the lands described by him and the statements hereinbefore made are true to the best of our knowledge and belief.

(Sign here with full Christian name.)

(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____, _____); that I verily believe affiants to be credible persons, and the (P. O. address.)

identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at _____, this _____ day of _____, 19__.

(Official designation of officer.)

[Form 4-283 B.]

NOTICE FOR PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,

LAND OFFICE,

_____, 19__

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the acts of Congress approved June 27,

1906 (34 Stats., 517), and March 2, 1907 (34 Stats., 1224), we will offer at public sale to the highest bidder, at _____ o'clock, _____ m., on the _____ day of _____, next, at this office, the following tract of land: _____

Any persons claiming adversely the above-described lands are advised to file their claims or objections on or before the time designated for sale.

Register.

Receiver.

[Form 4-093.]

Affidavit for purchaser under section 3, act of March 2, 1907.

I, _____, being first duly sworn and upon oath, state that I am the purchaser of _____, section _____, township _____, range _____, in Nebraska, under the act of June 27, 1906 (34 Stats., 517), as amended by section 3 of the act of March 2, 1907 (34 Stats., 1224); that I am a _____ (state whether naturalized or native born)^a citizen of the United States; that said purchase is made for my own use and benefit, and not, directly or indirectly, for the use and benefit of any other person; that I have not heretofore purchased under the provisions of said act, either directly or indirectly, any lands, except _____ (here give description of lands heretofore purchased under this act, if any).

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified by _____), and that this affidavit was subscribed and sworn to before me at my office in _____ on the _____ day of _____, 190—.

REPAYMENT—"ERRONEOUSLY ALLOWED"—MISTAKE IN DESCRIPTION.

MARIE STEINBERG.

The term "erroneously allowed" in the act of June 16, 1880, authorizing repayment in cases where entries have been erroneously allowed and can not be confirmed, has reference solely to erroneous action on the part of the government, and furnishes no authority for repayment where by reason of mistake in description a timber and stone entry is made for land not intended to be entered.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 6, 1908.* (C. J. G.)

An appeal has been filed by Marie Steinberg from the decision of your office of June 26, 1908, denying application for repayment of the purchase money paid by her on timber and stone entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 11, T. 39 N., R. 3 E., Lewiston, Idaho.

The entry was made November 27, 1906, and in her sworn statement and proof applicant herein stated, among other things, that she

^aIf naturalized, record evidence thereof must be furnished.

had personally examined the land; that the same was uninhabited, unfit for cultivation, and valuable chiefly for its timber. The entry was canceled on relinquishment February 24, 1908, applicant having discovered that she had been deceived by her locator; that, due to this deception, instead of describing the land she had actually examined and intended to enter, the description furnished and used by her was for another and different tract which she had not examined nor intended to enter. Repayment can only be allowed upon specific statutory authority. The instances in which repayment is authorized by the act of June 16, 1880 (21 Stat., 287), are where entries are canceled for conflict or have been erroneously allowed and can not be confirmed. It is clear that a mistake was made in this case but it was one for which the applicant is solely responsible. The words "erroneously allowed," employed in the repayment act, have uniformly been construed to refer to an act of the government. The principle controlling this matter is announced in the cases of William E. Creary (2 L. D., 694); Arthur L. Thomas (13 L. D., 359); and Adolph Nelson (27 L. D., 272); on review, 27 L. D., 448.

Although no reference is made thereto in the appeal, the Department will take judicial cognizance in this connection of the act of March 26, 1908 (35 Stat., 48), section one of which reads:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

It was not the purpose of this act to repeal or modify prior laws governing repayments but merely to supplement such laws. It was primarily intended by said section one of the act to afford relief in a class of cases wherein repayment was not theretofore authorized, namely, where moneys are covered into the Treasury "under any application to make any filing, location, selection, entry, or proof" and in the process of adjudication such application, entry, or proof is rejected, the party or his legal representatives not being guilty of fraud or attempted fraud in the transaction. In this case, while the element of fraud or attempted fraud may be entirely absent, yet the application or entry of Marie Steinberg was not rejected by the government, but, on the contrary, her application was accepted and the entry allowed thereon was only canceled because of the voluntary relinquishment or surrender of claim thereunder. Hence, the case is not one coming under either the act of June 16, 1880, or the act of March 26, 1908.

The decision of your office herein is affirmed.

FEES FOR EXECUTING AFFIDAVITS AND DEPOSITIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 9, 1908.

REGISTERS AND RECEIVERS,

United States District Land Offices.

GENTLEMEN: Section 2294 of the Revised Statutes of the United States, as amended by the act of Congress of March 4, 1904 (33 Stat., 59), prescribes the maximum fees which may be charged and collected for the preparation and official execution of affidavits and depositions, intended for use as evidence in connection with any entry of the public lands, as follows:

For each affidavit, twenty-five cents.

For each deposition of claimant, or witness, when not prepared by the officer, twenty-five cents.

For each deposition of claimant, or witness, prepared by the officer, one dollar.

The same statute prescribes a penalty of not less than one hundred dollars fine for any violation of its prohibition against the exaction of a greater fee for any of the services therein specified.

It has come to the knowledge of this office that owing to a misconstruction of this statute, it is the practice of many of the officers authorized to prepare and execute the papers therein enumerated to regard those documents required in the submission of annual proof of expenditure on desert land entries as *depositions*, and to collect a fee of \$1 for each such document prepared by them. The essential form and contents of such papers constitute them affidavits, rather than depositions, and for any officer to demand and receive a fee of more than 25 cents for their preparation and execution is in contravention of the statute above referred to.

You will at once transmit a copy of this circular to each and every officer in your district who is, by law, authorized to administer oaths in connection with the submission of such proofs, to the end that continued violations of the statute against excessive fees may be prevented.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,
Secretary.

NOTE.—The officer's certificate on *all* blanks indicates whether the paper is an "affidavit," or a "deposition."

RAILROAD LANDS—RIGHT OF PURCHASE—SECTION 5, ACT OF MARCH 3, 1887.

JOHN SPIERS ET AL. (ON REVIEW).

After the holder of a contract of purchase from a railroad company surrenders the same to the company and receives the purchase money, he has no such right remaining as can by assignment to another invest him with a right of purchase from the government under section 5 of the act of March 3, 1887.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 12, 1908.* (L. R. S.)

The Department has considered the motion filed September 14, 1908, in your office by John Spiers *et al.* for review of its decision rendered August 7, 1908 (37 L. D., 100), affirming the action of your office of February 17, 1908, rejecting the applications of Mrs. O. M. Jenkins, W. W. Jenkins, and John Spiers, assignee, to purchase under section 5 of the act of March 3, 1887 (24 Stat., 556), Sec. 29 and fractional Sec. 31 of T. 5 N., R. 16 W., S. B. M., Los Angeles, California, land district.

The record shows that the land in question is within the primary limits of the grant to the Atlantic and Pacific Railroad Company by act of July 27, 1866 (14 Stat., 292), and is opposite the unconstructed portion of the road, the grant to which was forfeited by act of July 6, 1886 (24 Stat., 123). The land is also within the primary limits of the grant, by act of March 3, 1871 (16 Stat., 579), to the Southern Pacific Railroad Company, branch line, and, after the decision of the Supreme Court (October 18, 1897) in *Southern Pacific Railroad Co. et al. v. United States* (168 U. S., 1), holding that said company had no right to the lands under said grant, they were duly restored to entry, April 13, 1898, with certain exceptions, to take effect, September 7, 1898. The sections in question are also within the limits of the reservation known as the Pine Mountain and Zaca Lake Forest Reserve, created by executive proclamation of March 2, 1898 (30 Stat., 1767), and June 29, 1898 (*id.*, 1776), now the Santa Barbara Forest Reserve by executive proclamation of December 22, 1903 (33 Stat., 2327). Said proclamations contain a paragraph as follows:

Excepting from the force and effect of this proclamation all irrigation rights and lands lawfully acquired therefor, and all lands which may have been, prior to date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law and the statutory period within which to make entry or filing of record has not expired.

It appears that, November 25, 1898, W. W. Jenkins filed his application to purchase said Sec. 29 and on the same day Mrs. O. M.

Jenkins applied to purchase Sec. 31 under said section 5, each claiming by virtue of an assignment of the vendee of the railroad company, but they did not complete their applications. December 22, 1908, W. W. Jenkins surrendered to the railroad company his contract of purchase, and, January 3, 1899, Mrs. O. M. Jenkins surrendered her contract of purchase, and each received from the railroad company the purchase money paid thereon. November 28, 1903, said applicants assigned their right to purchase said land to John Spiers for a nominal consideration, who, January 3, 1904, filed in the local office separate applications to purchase said tracts under said section 5, and, February 18, 1904, submitted proof in support of his right of purchase, but not being prepared to make payment for the land none was tendered until August 22, 1907. November 1, 1907, the local office forwarded the papers, including the protest of the Forest Service, and your office, February 17, 1908, rejected said applications. The applicants appealed and insisted:

The right to the land and right to the money were derived from different sources and were distinct rights; that to the land arose from the statute; that to the money arose from breach of the contract on part of the railroad company . . . The Government has no rights inside the forest reserve except such as are given to it by section 24 of the act of March 3, 1891, and the provisions therein contained do not authorize the President to establish forest reserves and extinguish fixed rights to the premises contained within the boundary of the reserve.

In the decision sought to be reviewed the Department conceded the correctness of the first contention of appellant on the authority of its decision in *Americus v. Hall* (on review; 30 L. D., 388, 391-3), but it held that the right given by said section 5 "was a privilege or option to acquire right and title rather than a vested right in the land," citing *Ramsey v. Tacoma Land Company* (196 U. S., 360, 363), and that this privilege must be pursued with diligence and the failure to exercise it within a reasonable time will render the land subject to appropriation by the Government to public uses.

It was also stated that a "holder of a mere privilege like this is entitled to no more time to show intent to exercise it than is the settler who has attached himself to the soil, made improvements, expended his money and labor, and made himself a home," citing departmental decisions in homestead and timber-stone applications in the following cases: *Hattie E. Bradley* (34 L. D., 191); *Joshua L. Smith* (31 L. D., 57); *Emma H. Pike* (32 L. D., 395); *Zachary T. Hedges* (32 L. D., 520).

Reference was also made to the case of *Clogston v. Palmer* (32 L. D., 77, 83), relied upon by counsel for applicants in his brief in support of the appeal from your office decision, and it is noted that the application in that case was made within three months from the

time the land was subject to entry, which was not stated in the decision.

It is strenuously insisted by counsel for applicants that the Department erred in holding that delay of the protest, under the circumstances, "constituted such a laches as to warrant the forfeiture or denial of the relief provided by the act of March 3, 1887," and it is insisted "that no injury has been done, nor will accrue to any one by reason of the delays which have occurred in the matter of proving title to these lands by the applicants" under said section 5, and, since no statutory limitation is found in said section 5—

there is no authority vested in the executive department of the Government to make requirement of prompt or speedy presentation or completion of claims under said act, nor to declare forfeiture of right on account of delay in so doing, especially in a case like this where no injury has resulted, or may result, to any one from the failure of the beneficiaries to promptly and diligently prosecute to completion their respective claims.

It will be observed that the contentions of counsel in said motion were fully considered and decided in said departmental decision. It was stated therein that parties were fully notified by said proclamation of March 2, 1898, that the Government had reserved said lands with other surrounding tracts in the forest reserve, "incurring in respect to it large expenditure of money for conservation of its forces and the water sheds of the streams."

It cannot be successfully denied that large sums of money have been expended by the Government in the care of said forest reserve from year to year, and it would be manifestly detrimental to the interests of the Government to permit applicants under said section 5 to delay indefinitely to perfect their claims. Moreover, the learned counsel for the applicants is clearly in error in his contention concerning the authority of the Department to require the beneficiaries to promptly complete their claims. It may be conceded that there is no specific statutory requirement in said section 5 that claimants thereunder must complete their claims within a specified time, but, in the absence of such requirement, the Department, in the exercise of its supervisory authority, may properly require that said applicants must exercise due diligence in making proof and payment for lands claimed under said section.

From almost the beginning it has been uniformly held by the Supreme Court—

that the head of a Department in the distribution of its duties and responsibilities is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for everything he does. No Government could be administered on such principles. (*U. S. v. MacDaniel*, 7 Peter, 1, 15.)

In *Knight v. Land Assn.* (142, U. S., 161, 181), the Supreme Court said:

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government which is a party in interest in every case involving the survey and disposal of the public lands.

In *Orchard v. Alexander* (157 U. S., 372, 381-382) the Supreme Court quotes extensively, with approval, from the decision in *Knight v. Land Assn.*, *supra*, wherein, speaking of the supervisory authority of the Department, it was said:

The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt.

Other decisions to the same effect might be cited but it is believed to be unnecessary.

But, aside from the foregoing, a further question is presented by the record which was not decided in the decision complained of and which is, in the opinion of the Department, conclusive of the right of movant in the premises, viz: whether a right of purchase exists under said section 5 of the act of March 3, 1887, in favor of one who asserted no claim or interest in the land under or through a contract of purchase from the railroad company, but who seeks merely to exercise the right of purchase under said section by reason of an attempted assignment of such right more than four years after the contract of purchase from the company had been surrendered and the purchase money returned to the assignee?

This question must be answered in the negative. It may be conceded that the contract of purchase from the railroad company is assignable and that the assignee has the same right of purchase under said section as his assignor under the assigned contract, but after the *bona fide* holder of the contract of purchase from the railroad company has surrendered such contract to the company and received the purchase money, he has no such right of purchase which he can assign to another that would give such assignee the right of purchase under said act of March 3, 1887. The surrender and cancellation of such contract terminated it and it was not intended by said act that the right of purchase from the Government could be assigned to another when the assignor had no existing contractual relations with the railroad company.

After a careful consideration of the whole record, including briefs of counsel both on appeal and in support of the motion for review, no good reason appears for modifying said departmental decision, and it is considered said motion must be and it is hereby denied.

SIMULTANEOUS APPLICATIONS—HIGHEST BIDDER—RIGHT OF ENTRY.

ERICKSEN *v.* VICK.

Where two or more applications for the same tract of land are held to be simultaneous, any question as to whether they were in fact simultaneous is waived by appearance and participation in the bidding for the right to enter without protest.

Where the right of entry as between simultaneous applicants for the same land is awarded to the highest bidder, and the applicant making the highest bid fails to pay the amount bid by him, within the time fixed by the local officers, the next highest bidder should thereupon be awarded the right of entry.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 12, 1908.* (A. W. P.)

An appeal has been filed by Albert E. Vick from your office decision of April 11, 1907, wherein you reject his application and allow Rudolph Bernhard Ericksen to make homestead entry for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 35, T. 153 N., R. 72 W., Devils Lake, North Dakota, land district.

It appears from an examination of the papers in this case that on May 9, 1906, the local officers issued notice of preference right on account of his successful contest against a former entry embracing the above-described land to one Arthur Ericksen; that on May 18, 1906, Rudolph Bernhard Ericksen appeared at their office and presented Arthur Ericksen's preference right with the indorsement: "Please let Rudolph Ericksen file on said land described above," signed "Arthur Ericksen;" that the party being unable to speak English, the register filled out the necessary homestead papers for him, when one Albert E. Vick, who had entered the office just before Ericksen, discovered that he also wanted the same tract, and presented his homestead application, with a waiver of Arthur Ericksen's preference right attached; that as neither party had been sworn to the matters alleged in their respective affidavits, the register held the applications to be simultaneous, and offered the right of entry to the highest bidder; and that Ericksen, having made the highest bid (\$175), was awarded the right of entry, when he discovered that he had not sufficient money to pay said sum and the fees and commissions, as result of which he was allowed by the register a reasonable time within which to procure and pay the necessary sum. July 17, 1906, Ericksen, having failed to make payment as required, the local officers declared the award forfeited and notified both parties to appear on July 31, 1906, and again submit bids for the right of entry. Neither party having responded, new notices were served upon them on August 20, 1906, appointing ten o'clock A. M. on the 30th thereafter as the time they might appear and offer bids. It

appears that at 9:45 A. M. on that date Ericksen called up the local office by telephone from the county where the land lies, and stated that he had mistaken the place at which the bids were to be offered, and requested postponement of the matter to three o'clock P. M. of that day, which was agreed to by the register; that at ten o'clock A. M. of said day one Flynn appeared for Vick, and having been informed of the postponement submitted a bid of one dollar for his client; that at three o'clock P. M. Ericksen appeared and bid the sum of five dollars for the right of entry, Flynn being also present, but declining to make further bid, contending that he had appeared at the hour set and had made the only bid, and that therefore his client should be awarded the right to enter the land.

Upon consideration of the matter, the register held that Ericksen having made the best bid should be awarded a right to make entry of this land, while the receiver held that Ericksen having been awarded the right to enter the land for \$175, and having failed to pay this money, thereby forfeited any further right to be considered in the matter, but that if this were not held to be correct, he was of the opinion that the register had no right to adjourn the bid beyond the hour set therefor in the notice to both parties; that at this hour Vick having made the only bid received should be awarded the right of entry, and that the bid received later should be disregarded. In view of the fact that the local officers were thus unable to agree upon the rights of the respective parties to this proceeding, they transmitted both applications to your office by letter of September 6, 1906, with a full statement of the facts, substantially as heretofore recited, for your decision in the matter.

Upon consideration of the case your office, by decision of April 11, 1907, held that:

It is clear that Ericksen, having first engaged the attention of the register on May 18, 1906, was entitled to complete his application by taking the required oaths, in preference to Vick. This feature of the case and all others that arose prior to August 30, 1906, were, however, waived by the presence without protest, that day of both parties for the purpose of making bids.

The postponement from 10 A. M. to 3 P. M. was a matter within the reasonable discretion of the register, and I am unable to see that Vick was thereby deprived of any right. The decision of the register is, therefore, affirmed and that of the receiver reversed, subject to Vick's right of appeal.

Accordingly you directed that Ericksen be allowed sixty days from notice within which to complete his entry for said land, and that in the event he failed, to then notify Vick and allow him a similar period within which to make such homestead entry.

As result of the appeal from your said decision filed by Vick, the Department has carefully examined the report of the local officers, and other papers in the case, and upon full consideration thereof is of the opinion, as held by you, that the question as to whether the respec-

tive applications were in fact simultaneous was waived by the parties to this proceeding when they appeared without protest and submitted competitive bid for the right to make entry of the tract in controversy. Thereafter Ericksen, having submitted the higher bid (\$175), was properly awarded the right of entry, but when he failed to perfect same by making this payment and the required fees and commissions within the period of time granted by the register, his application should then have been rejected and Vick advised of this fact and that he would be allowed a reasonable time within which to pay such sum as he may have bid for this right and to otherwise perfect his entry. While the local officers did not report what sum was bid by the latter, they indicate that he was a competitor for the right to make homestead entry of this tract, and if so, when Ericksen failed to perfect his application, Vick's right as a competitive bidder was next entitled to consideration.

There was clearly no warrant in the local officers setting a further day for disposing of the right by competitive bidding as between Ericksen and Vick under their prior applications.

Because of Ericksen's failure to make payment and complete entry under his successful bidding, all rights under his application heretofore tendered for this tract are at an end.

The local officers should be instructed to advise Vick of his right to complete entry, upon payment of his highest bid within thirty days after notice, failing in which his application will also stand rejected and the tract held subject to entry by the first legal applicant.

The decision of your office is accordingly modified as herein indicated.

PATENT—AMBIGUOUS DESCRIPTION—RAILROAD SELECTION.

McKITTRICK OIL COMPANY *v.* SOUTHERN PACIFIC R. R. Co.

In 1892 the Southern Pacific Railroad Company filed application, subsequently approved, to make selection of a certain legal subdivision, described according to the official plat of the survey (of 1869) then in use as "fractional section 1" of a certain township and as containing 641.40 acres. In 1894 a resurvey of the township was made, on the plat whereof the subdivision so selected was shown as lot 37, and another and different tract was shown as section 1, also fractional, containing 206.47 acres. In 1896 patent issued to the company, on its approved selection, for "all of fractional section 1, containing six hundred and forty-one acres, and forty hundredths of an acre," in said township.

Held: That in view of the record upon which it issued, the patent vested title to the tract actually selected and intended to be selected by the company in accordance with the original survey, the identity of which tract was preserved upon resurvey, and not to the tract designated as fractional section 1 by the later survey.

Southern Pacific R. R. Co. *v.* Bruns, 31 L. D., 272, recalled and vacated.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 13, 1908.* (E. P.)

December 28, 1904, the McKittrick Oil Company presented an application for patent for what is called the California Oil Company No. 28 placer mining claim, embracing lots 1 and 2 and the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, T. 30 S., R. 21 E., M. D. M., Visalia land district, California, which application was rejected by the local officers on the ground that the land applied for had been patented to the Southern Pacific Railroad Company, and was not therefore public land of the United States subject to disposition under the mining laws.

On appeal by the mineral claimant your office, by decision of April 12, 1905, affirmed the action of the local officers, citing the case of Southern Pacific Railroad Company *v.* Bruns (31 L. D., 272) as holding that title to the land in question passed to the railroad company under a patent issued to it January 25, 1896. The mineral claimant again appeals.

The appellant, while conceding that the land here in question is a part of that the title to which was held by the Department in the decision cited to have passed to the Southern Pacific Railroad Company by the patent of January 25, 1896, contends that that decision was erroneous; that it was not the land involved in that case, but another and different tract, to which the railroad company took title under that patent; that the land here in question has never been patented, and is public land of the United States, and, being mineral in character, is subject to appropriation under the mining laws. With the record are affidavits filed on behalf of the claimant, wherein it is alleged that on September 19, 1899, a number of persons located the tract applied for as the California Oil Company No. 28 placer claim, and thereafter maintained continuous and exclusive possession thereof until December 2, 1899, when they sold and conveyed the claim to the McKittrick Oil Company, the applicant for patent; that ever since such sale and conveyance the applicant has been, and is now, in exclusive possession of the tract; that on August 25, 1901, the claimant explored the premises and discovered thereon a valuable deposit of petroleum; that after acquiring the possession and ownership of the premises the claimant caused to be placed upon the land improvements of the value of \$4,000; that a well, 2000 feet deep and penetrating 195 feet of oil sand, has been sunk on the tract; that this well is capable of producing, and has actually produced, twenty-five barrels of oil per day; and that the land is more valuable for oil than for any other purpose.

In view of the contentions of the mineral claimant, and of the facts and circumstances alleged, as above stated, the Department, by letter of October 4, 1906, directed that the railroad company be called upon

to show cause why the departmental decision in the case of Southern Pacific Railroad Company *v.* Bruns, *supra*, should not be reconsidered, to the end that, if any error prejudicial to the rights of the mineral claimant (which, while asserting a claim to the land at the time that decision was rendered, was not a party to the case) was made, such error might be corrected, or, if the mineral claimant should be shown to be without rights in the premises superior to any the railroad company may have, such steps might be taken by the Department as would effectually set at rest, so far as the Department could do so, any question that might arise in the future with respect to the company's title to the land. The company was accordingly called upon by your office to make the showing, and it having responded, the case is now before the Department for final consideration.

It appears that by an approved survey of township 30 south, range 21 east, M. D. M., made in 1869, "section 1" thereof was returned as fractional, containing 641.40 acres. February 17, 1892, the Southern Pacific Railroad Company, under the provisions of the act of July 27, 1866 (14 Stat., 292), made indemnity selection, per list No. 48, in terms of all of fractional section 1 of township 30 south, range 21 east, M. D. M., containing 641.40 acres, assigning as a basis therefor a certain section, containing 640 acres, lost in place.

Subsequently your office submitted to the Secretary of the Interior, for his approval, a clear list (supplemental No. 22) of selections on account of the grant to the Southern Pacific Railroad Company under the act of July 27, 1866, which list included, according to its terms, all of fractional section 1, township 30 south, range 21 east, containing 641.40 acres, and referred to the tract as that included in the company's original list No. 48. January 5, 1896, this clear list was approved by the Secretary; and on January 25, 1896, a patent was issued to the company, reciting:

And whereas the following tracts have been selected under the act aforesaid by the duly authorized land agent of the Southern Pacific Railroad Company, as shown by his original list of selections approved by the local officers and on file in this office—

* * * * *

South of the base line and East of Mount Diablo Meridian, State of California.

* * * * *

All of fractional section one, containing six hundred and forty-one acres, and forty hundredths of an acre.

* * * * *

Now Know Ye, that the United States of America, in consideration of the premises and pursuant to the said acts of Congress Have Given and by these presents Do Give and Grant unto the said Southern Pacific Railroad Company of California, and its successors and assigns, the tracts of land selected as aforesaid.

In the meantime, however, to wit, in 1893, a resurvey of the subdivisional lines of said township 30 was made, which was approved April 6, 1894, and the plat thereof duly filed. The section lines of the survey of 1894 differ very materially from those of the earlier survey, but the exact *situs* of all tracts entered or selected under the earlier survey are preserved by the later survey, on the plat whereof such lands are designated as *lots*, numbered from 37 to 117, inclusive, and the names of the respective claimants thereto noted on the plat just above the lot numbers. Thus *fractional section 1* shown on the plat of the survey of 1869 is designated on the plat of the survey of 1894 as *lot 37*, and immediately above the lot number is placed the abbreviation "S. P. R. R. Co.," indicating that the limits of the original section 1 were thus defined and preserved for the benefit of the company under its selection. Immediately south of and adjoining the tract so designated as lot 37, a tract, containing 206.47 acres (which was returned by the survey of 1869 as a portion of "section 12"), is shown on the plat of the survey of 1894 as "section 1" (fractional), the subdivisions thereof being designated as lots 1, 2, 3 and 4, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$.

December 30, 1899, Carl A. Bruns made application to select, under the provisions of the act of June 4, 1897 (30 Stat., 11, 36), lots 1, 2, 3 and 4 and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 1 of said township 30; and on January 10, 1900, the Southern Pacific Railroad Company applied to make indemnity selection of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section. Both were therefore subsequent to the survey of 1894; and those descriptions include all of, and tally exactly with, the subdivisions of the "section 1" designated and established by that survey. The local officers rejected the company's application to select, for conflict with Bruns's prior application. From this action the company appealed, contending that the land, being within the indemnity limits of the road, was by law reserved for it from the date of the filing of its map of general route; that Bruns's application, not having been presented until many years subsequently to the definite location of the line of road, was invalid, and hence constituted no bar to the company's selection of the land. Upon consideration of the applications of Bruns and the company, your office, by decision of November 22, 1900, rejected both, on the stated ground that the land applied for was covered by the company's patent January 25, 1896. By decision of December 15, 1900, however, your office recalled its former decision, and held that those tracts were not embraced in the patent of 1896 and that Bruns's claim thereto was superior to that of the company. The action of the local officers was therefore affirmed.

From the latter decision of your office the company appealed, contending (for the first time, it would seem) that the patent of 1896,

having issued after the approval of the last survey (1894) of the township, covered not only the tract designated as fractional section 1 on the plat of the earlier survey, but the tract so designated on the plat of the later survey as well, and that for this reason your office erred in allowing Bruns's application. In passing upon the case the Department, in its decision aforesaid, now cited by your office, said and held:

Said patent conveyed title to "all of fractional section one," within said township.

This language is clear and unambiguous and the only land meeting the description "all of fractional section one," according to plat of survey of 1894, which was the then accepted plat in use governing the disposal of public lands in this township, is the land now in question.

As before shown, the land returned as fractional section one by the survey of 1869, was returned by the survey of 1894 as lot 37, and includes land within the section lines of what would be both sections one and two according to the survey of 1894, if made as original surveys are usually made. The statement of acreage in the patent must yield to the other and more definite terms of description there employed.

It results that a tract was patented to the railroad company for the selection of which no previous application had been made and that the tract selected by the company in 1892 has not been patented. Consequently a basis for the patented tract has not been assigned. While the patenting of a tract not previously selected was irregular, the effect of the patent is unimpaired, and you are directed to call upon the company to specify from the lands lost within the place limits of its grant a basis for the lands so irregularly patented.

The selection made February 17, 1892, of all of fractional section one, containing 641.40 acres, should have been considered after the Carpenter survey, as a selection of lot 37 of township 30 N., R. 21 E., M. D. M., and said selection will be so treated and passed to patent unless, upon consideration by your office, a sufficient objection appears thereto.

The Department concurs in the views expressed in your office decision of November 22, 1900, and therefore reverses your office decision of December 15, 1900, appealed from.

The primary question involved was as to the identity of the tract described as fractional section 1 of township 30 south, range 21 east, M. D. M., to which the company took title under its patent of 1896. In deciding that question as it did the Department proceeded rather on the assumption that a patent must *in all cases* be read in connection with the plat of survey on file at the date of the issuance of the patent, where prior thereto two or more conflicting or inconsistent surveys had been made of the township embracing the tract named in the patent. But upon the present direction of its attention to the question, now again involved, the Department, after a very careful and, it is believed, exhaustive search, has been unable to find a single case wherein any such rule has been laid down. It does find, however, a case (*Gleason v. White*, 199 U. S., 54) the essential facts whereof are very similar to those disclosed in this case, in which a

different rule was applied. It appears therein that on April 4, 1870, one Gleason made homestead entry of lots 1 and 2 (containing 164.84 acres) of section 19 of a certain township in Florida, which lots comprised all of the land in that section (which was fractional) as shown upon the plat of a survey approved July 10, 1845, that being the then accepted plat of survey of the township. In 1874 a new survey of the section was made, and was approved February 1, 1875. By the later survey the section was shown to contain 337.76 acres, and was divided into seven lots, numbered from 1 to 7 inclusive. The land entered by Gleason was, on the plat of the later survey, designated as lots 3, 4, 6 and 7, the other land in the section being designated as lots 1, 2 and 5. More than three years after the approval of that survey and the filing of the plat thereof, a patent was issued to Gleason for lots 1 and 2, containing 164.84 acres, pursuant to his entry and according to the survey of 1845. Thereafter Gleason's transferee, claiming title under the patent to the whole of fractional section 19, instituted ejectment proceedings to recover possession of said lot 5. Judgment was rendered against the plaintiff in the trial court, and the same having been affirmed by the Supreme Court of Florida, the plaintiff brought the case to the Supreme Court of the United States. That court gave consideration to all the circumstances, and held that Gleason took title under his patent to the land actually entered by him (that is to say, the lots 1 and 2 shown upon the plat of the survey of 1845) and to that only, affirming the action below. The Department is of opinion, therefore, that the assumption upon which its previous decision with respect to the land here in question was based was erroneous, and that the case should have been, and should now be, in determining the subject matter of the patent, considered and decided with reference to the record involved in the issuance of the patent.

The patent of 1896 in terms conveyed, together with other tracts, "All of fractional section one, containing six hundred and forty-one acres, and forty hundredths of an acre" of township 30 south, range 21 east, M. D. M., and recited that said lands "have been selected . . . by the duly authorized agent of the Southern Pacific Railroad Company as shown by his original list of selections, approved by the local officers, on file in this (General Land) office." The tract of 206.47 acres does not answer that description, for two reasons. First, that tract had not been selected by the company. The only tracts in the township that had been selected by the company at the date the patent issued were those shown on the original list filed February 17, 1892. That tract was not only not shown on that list, but, being at the time when the selections were made and at the date of the filing of the list embraced within an even-numbered section, could not have been selected. Second, at the time of the selections it was not "frac-

tional section one," and it does not correspond in area with that of the tract named in the patent. And the fact that the tract had not been selected by the company, considered in connection with the recitals in the patent, and the fact that your office was without authority to patent to the company, as indemnity, an unselected tract, makes it clear that your office did not intend by the patent, and could not have intended, to convey that tract to the company. Nor did the company accept the patent as a conveyance to it of that tract, or at any time prior to January 10, 1900, regard the tract as having passed to it under the patent. This is clearly established by the fact that on the date last named, and nearly four years after the issuance of the patent, the company made formal application to select the greater portion of the tract as indemnity land.

On the other hand, the tract represented on the plat of the survey of 1869 as fractional section one (and segregated by the survey of 1894, as an appropriated tract, under the designation of lot 37) was the tract actually selected by the company. The selection thereof was made with reference to the survey of 1869, which was the then accepted official survey of the township. The patent was issued with express reference to that approved selection, and described the land exactly as it was described in the selection list, and in all respects according to its designation on the plat of the survey of 1869. The connection between the patent and the survey of 1869 is thus shown to be direct, precise and complete. Furthermore, the patent was accepted by the company as a conveyance to it of the identical tract represented upon the plat of that survey as fractional section one, as is clearly shown by its assertion of claim thereto under the patent, and its application presented long after the date of the patent, to select the tract represented as fractional section one on the plat of the later survey. In short, the patent was based upon and comported with the company's selection of 1892, and that, in turn, was based upon and in every respect comported with the survey of 1869; and the patent was so understood and accepted by the company.

In view of these circumstances the Department is constrained to hold that the tract represented as fractional section one of township 30 south, range 21 east, M. D. M., on the plat of the survey of 1869, and not the fractional section one of that township as returned by the survey of 1894, is the tract that passed to the Southern Pacific Railroad Company by its patent of January 25, 1896. The departmental decision in the case of Southern Pacific Railroad Company *v.* *Bruns, supra*, is therefore recalled and vacated.

This removes the objection raised by your office to favorable action on the application of the McKittrick Oil Company, and in the absence of further objection the application will be accepted.

The decision appealed from is accordingly reversed.

PLACER MINING CLAIMS—CONFORMITY—SECTION 2331, REVISED STATUTES.

SNOW FLAKE FRACTION PLACER.

Section 2331 of the Revised Statutes applies to placer locations upon both surveyed and unsurveyed lands, and the provision therein that such locations shall conform as nearly as practicable to the "system of public land surveys and the rectangular subdivisions of such surveys," contemplates that locations upon unsurveyed lands shall, as nearly as reasonably practicable, be rectangular in form, compact, and with east-and-west and north-and-south bounding lines.

A placer location, whether upon surveyed or unsurveyed lands, will not be required to conform to the public land surveys and the rectangular subdivisions of such surveys when such requirement would necessitate placing the lines thereof upon other prior located claims or when the claim is surrounded by prior locations.

Rialto No. 2 Placer Mining Claim, 34 L. D., 44, overruled; and Golden Chief A Placer Claim, 35 L. D., 557, modified.

Where strict conformity is impracticable, placer locations hereafter made may be regarded as within the requirements in that respect where a location by one or two persons can be entirely included within a square forty-acre tract, by three or four persons within two square forty-acre tracts placed end to end, by five or six persons within three square forty-acre tracts, and by seven or eight persons within four square forty-acre tracts.

Placer locations in Alaska may be regarded as within the requirements respecting conformity, and approved for patent, if they are reasonably compact in form, contain the proper area, and are in accordance with the rules, regulations and customs of miners.

Whether a placer location conforms sufficiently to the requirements with respect to form and compactness is a question of fact for determination by the land department in the light of the showing made in each particular case, keeping in mind that it is the policy of the government to have all entries, whether of agricultural or mineral lands, as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular and fantastically shaped tracts.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 14, 1908.* (F. P.)

This is an appeal by Otto W. Carlson *et al.* from the action of your office of July 25, 1907, citing them to show cause why their entry (No. 63, Juneau, Alaska) for the Snow Flake Fraction placer mining claim, survey No. 596, should not be canceled because of the non-conformity of the claim to the system of the public land surveys and the rectangular subdivision thereof.

The claim was located July 17, 1900, upon land not embraced by the public surveys. The United States mining laws had been theretofore expressly extended to the District of Alaska by the acts of May 17, 1884 (23 Stat., 24, 26), and June 6, 1900 (31 Stat., 321, 329).

According to the field notes and plat of the mineral survey the claim, which is designated as a "bench" placer, has an area of 16,178 acres, and is bounded by six courses. One of the boundary lines runs nearly east and west, but the other five are laid at diagonals to the courses of public survey lines. For the most part the claim represents a diamond-shaped figure, with the greater traverse dimension from east to west. It is stated in the descriptive report included in the transcript of the field notes, and indicated on the plat, that the claim is adjoined on its northwesterly side by the Gambrinus placer, on the westerly boundaries by the Honey and All Gold Fraction placers, on the southerly (southeasterly) boundary by the Sugar placer, and on the northeasterly boundary by another claim, the name of which is unknown. However, it is entirely surrounded by these locations. Whether this claim was junior in location to those which are shown to surround it and was given the form it presents because of their existence and position, or whether because of the configuration of the ground or of peculiarities of the placer deposit, or otherwise, does not affirmatively appear.

This case involves the proper construction of sections 2329 to 2331, inclusive, of the Revised Statutes. These sections, as far as they are pertinent here, are as follows:

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

SEC. 2330. [In part] Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof, but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

SEC. 2331. [In part] Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

On January 5, 1884, Secretary Teller in a decision reversing the Commissioner of the General Land Office employed this language in the case of William Rablin (2 L. D., 764):

It appears that the location was made since 1872, and after official survey of the adjacent territory, that it covers the bed of Bear River for some 12,000 feet

and a small quantity of surface-ground along its banks, and that it does not conform to the system of surveys. From the evidence on file it appears that the "Bear River" is a very small, unnavigable stream, winding through a canon, with precipitous, non-mineral, and uncultivable banks, wherein have accumulated extensive placer deposits, which are embraced in said location.

Your decision is grounded on the alleged fact that the location does not conform "as near as practicable" to the system of public surveys, for the reason that the law requires "that placer locations upon the surveyed lands shall conform to the public surveys in all cases, except where this is rendered impossible by the previous appropriation or reservation of a portion of the legal subdivision of ten acres upon which the claim is situated." I think that sections 2329 to 2331, Rev. Stat., should not receive so narrow a construction. While they provide for ten-acre subdivisinal surveys, they also contemplate cases where it is not practicable to conform the location to such subdivisinal lines. They do not limit such cases to those where there has been a prior appropriation of a part of the subdivision, but extend it to every case where it may be impracticable to so locate the claim. The expression "as near as practicable" is therefore to be read "as near as reasonably practicable," and in each case presenting itself a sound discretion must be exercised in determining the question of practicability. It would be manifestly improper to limit it to a single case, namely, a prior appropriation of part of the subdivision, as your office seems to have done; for such a case is provided for by the general laws concerning the disposal of public lands, and in the placer-mining statutes, Congress has evidently intended to provide for cases where the situation of the deposits is such that conformity of the location with subdivisinal lines is unreasonable. It was the intention of the mining laws, generally, to permit persons to take a certain quantity of land fit for mining, and not to compel them to take such a quantity irrespective of its fitness for mining. The Act of July 9, 1870, which expressly required placer locations to conform to the lines of the public surveys, was unreasonable, a hardship, and in contravention of the established custom of the mining regions; therefore it was modified by the Act of May 10, 1872, so as to provide for exceptional cases where reason and common sense required a different regulation. Such an exceptional case, in my judgment, is that now before me, where the entire placer deposit in a canon within certain limits is claimed, and where the adjoining land on either side is totally unfit for mining or agriculture.

On October 14, 1887, Acting Secretary Muldrow, in the case of Pearsall (6 L. D., 227, 231) decided that—

The proper construction of sections 2329 to 2331 Revised Statutes, was carefully considered by this Department in the case of William Rablin (2 L. D., 764), wherein it is held that the requirement of the statute that the claim upon surveyed land must conform to the legal subdivisions thereof "as near as practicable," must be construed to mean that the claim must conform only "as near as reasonably practicable"; that it is the intention of the mining laws generally, to permit persons to take a certain quantity of land fit for mining and not compel them to take such a quantity irrespective of its fitness for mining; that the act of July 9, 1870 (16 Stat., 217) was modified by the act of May 10, 1872 (17 Stat., 91), so as to provide for exceptional cases.

The question of the conformity of placer claims to the United States system of public land surveys and the rectangular subdivisions of such surveys, had long lain in abeyance in the Department until

it was again presented and passed upon in the case of Miller Placer Claim (30 L. D., 225). Relying upon the decisions quoted (2 L. D., 764, and 6 L. D., 227) placer miners located claims of every conceivable form. The practice in the various mining districts had in the meantime produced some incongruous results. Placer claims of all shapes and forms were presented and approved for patent. The only restriction seems to have been that the placer location should not exceed the amount of land allowed by law. Little or no attention was given to the conformity provision of the statute. The survey of the Miller placer was remarkable in shape. It was composed of two large tracts of land over three miles apart. The southernmost tract embraced in its limits and followed the general course of the south fork of the South Platte River; while the northernmost tract had running through it for its entire length a stream known as Lost Park Creek. The two tracts were connected by a narrow strip of land over three miles long, apparently from thirty to fifty feet wide, which formed a portion of the claim as a whole. The Department disallowed the claim because it not only failed to approximately conform to the United States system of public land surveys and the rectangular subdivisions thereof but appeared to be totally at variance with such system, holding that the law affords no warrant for cutting the public lands into lengthy strips of such narrow width and such great length, whether the claim be located on surveyed or unsurveyed lands. The Department hereby especially approves the decision in the Miller Placer Claim case. Such a fantastically shaped claim is unwarranted.

The question, which again arose in the case of Wood Placer Mining Co. (32 L. D., 198) and upon which the entry was then held for cancellation, was considered at length upon a review of that case (*Id.*, 363). One of the claims involved was nearly one and three-quarters miles in length, and the general course of both was northeasterly and southwesterly in direction. The Department overruled the contention therein that the conformity requirement of the statute had no application to placer locations upon unsurveyed lands (the claims being on unsurveyed lands) and held that in such cases the locations, if practicable, should be rectangular in form, with east-and-west and north-and-south boundary lines, and otherwise approximating conformity to the public-survey system within the limits of practicability. This case is reaffirmed.

In the Hogan and Idaho Placer Mining Claims (34 L. D., 42), also located upon unsurveyed lands, the Department held that; inasmuch as tracts as small as ten acres in area, in square form, are recognized as legal subdivisions under the mining laws, a necessary inclusion therein of some non-placer land, as the result of compliance with the requirement of conformity, would not affect the

validity of the claim if the land so embraced would be as a whole more valuable for placer mining than for agricultural purposes. The two claims involved in that case, adjoining end on end, followed the winding course of, and embraced, the Crooked River for a distance of about three and one-half miles. The Department also declined to adjudge them "gulch" placers on a showing that the land rises from the river at slopes of from twenty to thirty degrees, holding it to be obvious that such slopes were not impracticable of location under the placer mining laws. The Department especially re-affirms the decision in this case in so far as it holds that the necessary inclusion of some non-placer land as the result of compliance with the requirement of conformity, does not affect the validity of the placer claim if the lands so embraced would be as a whole more valuable for placer mining than for agricultural purposes.

In Rialto No. 2 Placer Mining Claim (34 L. D., 44) the location had been made upon surveyed lands. At the time the claim was located it was surrounded by valid lode and placer claims. All of the unlocated land thus inclosed was embraced in the location. It was contended that it would have been impossible to have conformed to the lines of the legal subdivisions of the public survey without embracing non-contiguous tracts. The claim was rejected on account of its non-conformity. The Department held that the surrounding or adjacent mining locations were no bar to the conformity of the placer claim there in question, on the principle that prior locations do not of themselves amount to appropriations of land in such a sense as to preclude the inclusion of the same, or parts thereof, within the limits of a subsequent location, subject to such existing rights as may thereafter be maintained under the prior locations. The doctrine of this case was modified in Golden Chief A Placer Claim (35 L. D., 557) in which it is said:

The claim is bounded on all sides by other placer claims. The Catch All, which adjoins it on the north, has been patented. All the other adjoining claims were entered by Bergstrand, one of the applicants here, subsequently to the date of the entry in question, and it appears from informal inquiry at your office that, for some alleged or supposed irregularity, those entries are now under investigation. If, as a result of the investigation, the entries should be sustained as valid, there would be no possibility of reforming the lines of the claim here in question to conform to the United States system of public-land surveys (Sec. 2331, R. S.), and in that view the entry might be sustained as it stands. The case of Rialto No. 2 Placer Mining Claim (34 L. D., 44), cited by your office, deals with placer claims on surveyed lands, which the statute contemplates shall be described by legal subdivisions (Sec. 2329, R. S.), and furnishes no authority in the location of placer claims upon unsurveyed lands, for placing the lines of such locations upon previously patented or entered lands. If, on the other hand, the investigation of the surrounding entries should result in their cancellation, and the claim here in question should prove to be in other respects regular and valid, the obstacles which now pre-

vent its conformity to the United States system of public-land surveys would be removed, and in that event the case should be readjudicated under the principles which would then govern.

In the case of Laughing Water Placer (34 L. D., 56) the general question as to conformity was again presented and the prevailing interpretation was reaffirmed.

In the later case of Roman Placer Mining Claim (34 L. D., 260), citing the reported decisions beginning with Miller Placer Claim, *supra*, the Department properly held (syllabus) that—

The smallest legal subdivision of the public surveys provided for by the mining laws is a subdivision of ten acres, in square form, and such laws do not contemplate that in the location and entry of placer mining claims rectangular tracts of five acres may be recognized and treated as legal subdivisions.

The foregoing, together with many unreported decisions to the same general effect, have resulted from the incongruous forms and extravagant dimensions of numbers of placer locations which have of late years come before the land department for adjudication. Upon the theory that the conformity provisions had no relation to locations upon unsurveyed lands, and that the only limitation imposed by the law was that of area, it was considered that such locations could be elongated in proportion as they were narrowed, so as to secure the maximum area available under the law. For example, upon that theory, a location by eight persons to embrace one hundred and sixty acres, confined to an average of fifty feet in width, could be extended to a length of twenty-six miles; and this conception of flexibility of outline, which has often manifested itself in locations of curious shapes, has in numbers of cases been employed in the appropriation of water-courses, ravines, etc., for inordinate distances. A case decided by the Department October 6, 1900 (not reported), involved a single location over sixteen miles in length, with an average width of about fifty-one feet, containing 102.974 acres. Concrete instances could be multiplied.

In the correction of what the Department regards as clearly subversive of the law, the lines have been so tightly drawn as practically to impose a strict conformity, with few exceptional cases, to legal subdivisions if upon surveyed lands, or in accordance with the system of east-and-west and north-and-south bounding lines and of dimensions corresponding to appropriate legal subdivisions if made upon unsurveyed lands. In the light of the pending case, however, considered in connection with certain others of similar import now pending here on appeal and with the several accompanying briefs, without receding from the view that the limitations imposed by the law were designed to keep such locations within reasonable bounds, the Department is persuaded that it has observed a more rigid interpretation of

the letter of the statute than is warranted by a just regard for the mining conditions and customs and the interests in harmony therewith which must have been within the legislative contemplation.

Sections 2329 and 2330 are taken from the placer act of July 9, 1870 (16 Stat., 217), which amended the original lode law of July 26, 1866. The provisions of the act of 1870 carried into section 2329 permitted placer claims to be located both upon surveyed and unsurveyed lands, and contained the positive requirement, however, that locations on surveyed lands should strictly conform to the legal subdivisions of the public lands. The provisions of the same act which appear in section 2330, on the other hand, dealt with locations upon surveyed lands; authorized the further subdivision of established 40-acre legal subdivisions into 10-acre tracts; permitted joint entry of contiguous claims of any size, although less than 10 acres each, which might result from the division or partial appropriation of fractional subdivisions, and fixed the maximum area of a placer location at 160 acres with a requirement that it conform to the United States surveys.

The law of 1870, now appearing in sections 2329 and 2330, was too harsh and inflexible when actually put in operation. It was so unsatisfactory and so widely at variance with the methods theretofore prevailing in locating placers that Congress was speedily prevailed upon to change the law. It was made more elastic by the act of 1872, found in section 2331. This section plainly supplements and modifies the act of 1870, sections 2329 and 2330, as the Department has already held in *Wood Placer Mining Company, supra*. It is obvious from its opening clause that this section relates to locations both upon surveyed and unsurveyed lands. It not only waives further survey and plat when locations upon surveyed lands conform to legal subdivisions but impliedly contemplates cases of non-conformity. The act also by necessary implication recognizes locations upon unsurveyed lands. Then follows the broad provision that "All placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys;" clearly meaning that these limitations shall apply whether the locations be upon surveyed or unsurveyed land. It also has the further provision that "No such location shall include more than twenty acres for each individual claimant." The Department holds that this section 2331 applies to placer locations upon both surveyed and unsurveyed lands. The words in section 2331 "system of public land surveys and the rectangular subdivisions of such surveys", when applied to unsurveyed lands simply means that claims should, if practicable, have east-and-west and north-and-south bounding lines, and that the claim should be rectangular, if practicable, and in com-

pact form so that when the adjacent land is surveyed by the Government it will not find it cut into all conceivable shapes.

In 1 Lindley on Mines, 2nd ed., sec. 448, it is said: "As to whether it is practicable to make a location or survey conform to legal subdivisions is a matter which rests entirely within the land department." In *Price vs. McIntosh*, 1 Alaska, 300, Judge Wickersham held that a miner might locate twenty acres or less, if he desired, of placer mining ground in any form he chooses. This case was appealed to the Circuit Court of Appeals for the Ninth Circuit and there affirmed although the court did not rule upon the question of conformity (121 Fed., 716). In *Mitchell vs. Hutchinson*, 76 Pacific, 55, the Supreme Court of California, on March 8, 1904, construing sections 2329 to 2331, *supra*, requiring placer claims to conform to the lines of the public survey, decided that they are required to so conform only where it is reasonably practicable, and otherwise it is sufficient if they conform as near as is reasonably practicable. These citations are given to show the views held by text writers and courts. Whether placer claims conform sufficiently is a question of fact to be determined by the Department. Each case must be decided upon its own facts. It is the policy of the Government to have entries, whether they be for agricultural or mining lands, in compact form. Congress has repeatedly announced this principle, and the Department has always and does now insist upon it. The public domain must not be cut into long and narrow strips. No shoe-string claims should ever receive the sanction of the Department.

The Department is informed that most of the placer claims in Alaska are 1320 feet in length by 660 feet in width; also that in most cases the lines do not correspond to the rectangular subdivisions of our system of public surveys, that is to say, the bounding lines do not run on due north-and-south or east-and-west courses but usually follow the lines of old creek beds. The placer claim in this case is in Alaska. The public surveys have been extended very little there. It is entirely probable that the public lands in Alaska will not be surveyed to any great extent for years to come. The Director of the Geological Survey reports that he has given careful attention to mining conditions in Alaska; that there are thousands upon thousands of placer mining claims there; that practically none of them conform to the east-and-west or north-and-south lines of our system of public surveys; but that the claims are compact in form for the most part; that to attempt now to require conformity would involve the claimants in thousands of law-suits. It is a matter of public history that the late rulings of this Department upon the question of conformity have deterred most of the placer claimants in Alaska from making application for patents. The owners prefer to hold

their claims without securing patents and to work out the placer deposits and then abandon them. It is also true that with the very strict construction heretofore placed upon the law by this Department the placer claimants are unable to sell or dispose of their claims to advantage. Investors do not readily purchase unpatented lode or placer claims. They must be assured that no conflicts or law-suits can arise over the titles which they purchase. With a more liberal construction of the conformity provision of our placer act a large number of placer claimants in Alaska would apply for patents, and thereby enrich the Government to the extent of many thousands, perhaps millions of dollars. The interests of the Territory of Alaska demand a more favorable construction of the placer act. The Alaska miners are for the most part in the undisturbed and quiet possession of their respective placer claims. Our decisions on the conformity provision of the statute ought to encourage this harmony if possible rather than to precipitate lawsuits and strife and retard mining development. Placer claims in Alaska in reasonably compact form, containing the proper area, and located according to the rules, regulations and customs of miners, ought to be approved for patent.

The Department would now be unwilling to approve such long and irregular-shaped claims as were allowed in the case of William Rablin (2 L. D., 764) and in the case of Pearsall (6 L. D., 227), although the law in those cases is clearly and correctly stated. The Department also holds that it is unreasonable, impracticable and not in harmony with the conformity provision of the statute to require a claimant to conform to legal subdivisions of the public surveys and the rectangular subdivisions thereof when such requirement would compel a claimant to place his lines on other prior located claims or when his claim is surrounded by prior locations, and therefore disapproves the doctrine announced in Rialto No. 2 Placer Mining Claim (34 L. D., 44), and in stating this no distinction should be made whether the claim be on surveyed or unsurveyed lands. The principle of the case of Golden Chief A Placer Claim (35 L. D., 557) should be modified accordingly, and also all other cases not in harmony with these views.

Each case presented must be considered and decided on its own facts. Conformity is required if practicable. In the interest of wise administration and under the power which we think Congress has vested in this Department in the phrase "shall conform as near as practicable," taken from section 2331, *supra*, and in order to keep claims in compact form and not split the public domain into narrow, long and irregular strips, and to provide for a less harsh rule than that which has been followed recently, and to cover cases where strict conformity is impracticable, it is the view of this Department that a claim hereafter located by one or two persons which can be entirely

included within a square forty-acre tract, and a claim located by three or four persons which can be entirely included in two square forty-acre tracts placed end to end, and a claim located by five or six persons which can be entirely included in three square forty-acre tracts, and a claim located by seven or eight persons which can be entirely included in four square forty-acre tracts, should be approved. In stating this rule it is necessary to say that we do not intend that the forties which are made the unit of measure should necessarily have north-and-south and east-and-west boundary lines. Thus, no inordinately long and narrow claim could be patented, and no locator would be compelled to include non-placer ground unless he so desired, as was permitted in the case of Hogan and Idaho Placer Mining Claims, *supra*. Each claim heretofore located, as it comes up for patent, must be adjudged and decided upon its own facts.

The case is reversed and the claim will be passed to patent in the absence of other objection.

OKLAHOMA LANDS—NEUTRAL STRIP—LANDS SOUTH OF WASHITA RIVER NOT INCLUDED.

CHARLES A. MECK.

The "Neutral Strip" described in the act of June 6, 1900, and the President's proclamation of July 4, 1901, providing for and governing the opening of the Kiowa, Comanche, Apache and Wichita Indian lands, embraces only lands north of the Washita river, and no portion thereof extends south of that stream.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 17, 1908.* (J. F. T.)

August 6, 1901, Charles A. Meek made homestead entry number 38 for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 8 N., W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 6, T. 7 N., R. 14 W., I. M., containing 159.95 acres, under the plat of survey of July 29, 1874, and lying on both sides of the Washita River, El Reno, Oklahoma, land district.

A resurvey of the land north of said river was made, and plat approved May 4, 1903, which survey will govern in the issuing of final homestead papers in all cases affected thereby, and according to which that part of Meek's entry on the left bank, or north of said river is described as SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 8, and lots, 2, 8 and 11 Sec. 6, T. 7 N., R. 14 W., I. M., including also lot 12, said Sec. 6, on the south or right hand bank of said river. The fractional southeast quarter of section 6, including said lot 12, Sec. 6, was allotted to Kah lote June 18, 1901, being allotment number 2708.

You say:

The Act of June 6, 1900 (31 Stat., 672), granted to settlers on the lands north of the Washita River, known as the "neutral strip," a preference right of entry, but this right did not extend to lands south of said river already covered by Indian allotments.

It is contended upon this appeal that the "neutral strip" mentioned in the act of June 6, 1900, extended south of the Washita River.

The Department has never so held, and in a letter to the Commissioner of Indian Affairs of April 22, 1901, it was expressly held that lands south of said river in ranges 14 and 15 west might be allotted to Indians, but none north of river in same ranges.

The tract known as the "neutral strip," and described by that name in the act of June 6, 1900 (31 Stat., 672), and in the Presidential Proclamation of July 4, 1901 (31 L. D., 1), is that portion or parcel of land the limits and status of which is discussed in the cases of J. M. Johnson (15 L. D., 87) and Julia E. Meyers (28 L. D., 399), and it is clear that no portion of said tract lies south of the Washita River.

Your decision is affirmed.

SILVER LAKE POWER AND IRRIGATION CO. *v.* CITY OF LOS ANGELES.

Motion for review of departmental decision of September 9, 1908, 37 L. D., 152, denied by First Assistant Secretary Pierce, November 17, 1908.

RAILROAD INDEMNITY SELECTION—CLAIMS SUBSEQUENTLY INITIATED.

FERGUSON ET AL. *v.* NORTHERN PACIFIC RY. CO.

Where at the date of selection of a tract of land by a railroad company it is free from any adverse claim and is otherwise subject to selection, the claim of the company under its selection can not be defeated by any attempted initiation of rights between the date of selection and the approval thereof by the Secretary of the Interior in the regular course of business.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 20, 1908.* (G. B. G.)

This case is before the Department upon the appeal of Thomas Olson from your office decision of June 1, 1908, rejecting his homestead application for the SE. $\frac{1}{4}$ of Sec. 17, T. 53 N., R. 11 W., Duluth land district, Minnesota.

This land is within the thirty-mile indemnity limits of the grant of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company, and was selected by the Northern Pacific Railway Company,

successor in interest to the Northern Pacific Railroad Company, October 17, 1883, per indemnity list No. 10, in lieu of the NE. $\frac{1}{4}$ of Sec. 33, T. 52 N., R. 17 W., in said State, which was lost to said grant by reason of its having been approved to the State of Minnesota as swamp land May 7, 1878. This tract has never been used as a base for other indemnity selection and admittedly constitutes a valid base for the selection in question.

Olson's claim arises upon his homestead application for the land in controversy, filed in the local land office April 19, 1907, which was rejected because of the railway company's selection. He does not allege settlement upon the land but claims that it is, and was at the date of his application, vacant unappropriated public land subject to entry, and in support of his appeal rests his case mainly upon the decision of the Supreme Court of the United States in the case of *Peter O. Sjoli v. Charles Dreschel* (199 U. S., 564). In that case it was held broadly, among other things, that no rights to lands within indemnity limits could attach in favor of the Northern Pacific Railway Company until after selections made by it with the approval of the Secretary of the Interior and that up to the time such approval is given lands within indemnity limits, although embraced in the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws of the United States.

A careful examination of that decision does not justify the assumption that it is authority for the contention here made. A pertinent fact in that case was that prior to the time when, in pursuance of regulations of the Department, the railway company filed its list of selections of indemnity lands, Sjoli settled upon the land there in controversy, the settlement being made in 1884, which was a year before the land was listed by the railway company.

It may be admitted that the supreme court does not appear to give special or controlling importance to the fact that there was a settlement claim upon the land prior to its selection by the railway company, but it is still true that the broad lines of the decision must be considered with reference to the special facts of the case. This Department is not prepared to accept, and will not admit as controlling, a general ruling which, apart from the facts of the case, seems to hold that an indemnity selection by a railway company of land, subject thereto at the date the proffer was made, may be defeated by a claim of any kind initiated thereto subsequently. To admit such ruling would be to say that the railway company would have no sort of guarantee of a favorable outcome for its selection and that in every case such selection might be defeated by the initiation of claims thereto before the land department, in the orderly course of business, might be able to pass upon the sufficiency of the same.

Shortly after the decision of the supreme court above referred to was promulgated, it was referred to the Attorney-General of the United States for opinion as to whether its application should be limited in the administration of the public land laws to cases of the character there considered, or whether the broad lines of the decision should be followed. In his opinion of June 18, 1906 (Ops. Atty. Gen., Vol. 25, p. 632), this Department was advised that the ruling in said case should not be considered applicable to cases other than of the specific character there under consideration; that is, unless some valid claim, by settlement or otherwise, had been initiated to the land prior to the railway company's selection, it being otherwise subject to such selection, the claim of the railway company could not be defeated by any attempt to initiate rights between the date of selection and the approval thereof by the Secretary of the Interior, in the regular course of business.

John C. Ferguson and Harry B. McKenney asserted claims before the local land office and before your office, to this land, but inasmuch as their claims were denied by your said office decision of June 1, 1908, and they have not appealed, further reference to these claims is unnecessary. The decision appealed from is affirmed.

LEAVES OF ABSENCE—REGISTERS AND RECEIVERS AND SURVEYORS—GENERAL.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 21, 1908.

TO REGISTERS AND RECEIVERS
AND SURVEYORS-GENERAL.

GENTLEMEN: When leave of absence is desired for any purpose, timely application therefor, stating specifically the reasons and circumstances rendering such absence necessary, should be addressed and forwarded directly to this office. The leave will then be granted or withheld, as may seem just and proper. *But in the meantime and until the decision of the Department is received (except as herein-after provided) the officer will remain in the proper discharge of his official duties, from 9 o'clock a. m. to 4:30 o'clock p. m., each day, except Sundays and days declared public holidays by law.*

You are expected to remain at your post and give strict personal attention to your duties. Leave of absence will be granted for not exceeding thirty days in each calendar year, and then only for reasons

of the most urgent character and for the shortest possible time, upon the following conditions, viz:

First. The officer applying for leave of absence must designate in his application some clerk in his office to act for him, in his name, and at his own risk and responsibility, under his official bond, during his absence, in the performance of such purely ministerial duties as may under the law be properly delegated to another; but the clerk so designated cannot under any circumstances be authorized to perform any duties of a judicial character. All matters of a judicial character which require the joint action of the register and receiver must be postponed until they are both on duty. The clerk left in charge cannot be authorized to sign any official papers or documents.

Second. Either the register or receiver must be on duty during the absence of the other. In no instance can a register be authorized to leave his office in charge of the receiver, or *vice versa*. Applications for leave from the register and receiver of the same office for the same time cannot be approved.

Third. Upon return to duty the officer shall report by letter to this office the exact period of his absence, giving the date and hour he returns to duty.

Fourth. Where absence is on account of sickness, application therefor must be forwarded immediately upon return to duty, accompanied by the certificate of the attending physician, covering the period of absence. The certificate must show that absence was due entirely to sickness, and that the applicant was wholly incapacitated by reason thereof for the performance of office work or to be present at his office. In case of serious illness of an officer, this office should be notified and the regulations of paragraph 1 complied with as nearly as possible.

Fifth. If an emergency arises which requires you to leave your post of duty, and you do not have time to submit application by mail and receive a reply before the date the leave desired is to commence, request by wire will receive immediate attention, and reply made at the applicant's expense. Applications need not be made in advance for leave for *less* than one day, but the exact time of absence must be reported to this office.

Sixth. Your attention is called to the act of May 15, 1898, which provides as follows:

Hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class in their respective Departments, not less than seven hours of labor each day, except Sundays and days declared public holidays by law or Executive order.

Seven hours per day is the minimum, but the hours of labor may be increased at any time when, in the judgment of the register and receiver or surveyor-general, such a course is necessary for the prompt disposition of the public business; any such extension should be promptly reported to this office.

You are requested to acknowledge receipt hereof at your earliest convenience.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

D. N. CLARK.

Motion for review of departmental decision of August 20, 1908, 37 L. D., 116, denied by First Assistant Secretary Pierce, November 23, 1908.

ALASKA TOWNSITE-RAILROAD RIGHT OF WAY—"OCCUPANT."

BOVEY *v.* NORTHWESTERN DEVELOPMENT COMPANY.

A railroad company by the construction and maintenance of a line of railroad upon public lands in Alaska under the right-of-way provisions of the act of May 14, 1898, acquires merely an easement; and where any of the lands traversed by its line of road are subsequently embraced within a townsite and become town lots, the company is not, by reason of its right of way, an "occupant" of such lots within contemplation of section 11 of the act of March 3, 1891, and as such entitled to purchase the same, nor has it any such rights as will prevent other appropriation of the lots subject to the right of way.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 24, 1908.* (C. J. G.)

An appeal has been filed by J. E. Bovey from the decision of your office of May 16, 1908, which sustains the action of the town site trustee in dismissing Bovey's contest against the Northwestern Development Company involving lot 43 of block 67 in the town site of Nome, Alaska, and awarding said lot to the company.

The entry of Nome town site was made August 5, 1904, and patented to the town-site trustee January 16, 1906, pursuant to section 11 of the act of March 3, 1891 (26 Stat., 1095, 1099), a survey of the town site preparatory to application for patent having been made in 1903-1904. The lot in controversy was formerly within what is

known as the Simpson placer, after the rejection of which as a mining claim the land was entered by the trustee December 31, 1906, as a part of the town site of Nome and was patented to the trustee May 6, 1907.

The Northwestern Development Company is the successor in interest of the Nome Arctic Railroad Company which, in 1903, succeeded to the rights, privileges and property of the Wild Goose Railroad Company. A line of railroad was built by the latter company in 1900 outside the limits of Nome town site, which was extended into and through the town by the Nome Arctic Railroad Company in the summer of 1903, which extension was authorized by an ordinance passed July 27, 1903, by the Common Council of the city of Nome. The railroad was built and in operation at the date of the town site entry and has been continuously maintained and operated by the Northwestern Development Company. The official plat of the subdivisional survey of the town site was approved April 13, 1905. The last-named company in May, 1906, made application to the town-site trustee for the lot in controversy, which was suspended and the purchase money refused because of conflict with the Simpson placer. After rejection of the placer mining claim and entry of the land for town-site purposes, the company again applied for said lot but before issuance of the deed the application of Bovey was filed and a contest thus arose. A hearing was ordered between the parties and the respective attorneys submitted the case to the town-site trustee upon an agreed statement of facts wherein the claim of Bovey is set forth as follows:

Bovey derails title from J. MacSmith who moved on and settled upon the lot on or about the 15th day of June, 1906, and erected a building about twelve by sixteen feet on the northerly end of said lot and lived thereon until the 28th day of July, 1906, when he sold the lot and cabin to F. W. Wallace who took possession of the same and occupied it until the 9th day of August, 1906, at which time he sold the premises, together with the cabin, to J. E. Bovey, the claimant herein, who has occupied said cabin and premises ever since; that said cabin was built and has ever since been situated upon the northerly end of said lot extending in a northerly direction within ten or fifteen feet of the northerly end line of the lot in question.

The main question involved is whether the railroad company, by reason of the construction and operation of its line across the contested premises prior to and at date of town site entry thereof, is an "occupant" within the meaning and intendment of the town-site act. The act of May 14, 1898 (30 Stat., 409), granted right of way through the public lands in Alaska to any railroad company, duly organized under the laws of any State or Territory or Congress of the United States "which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation and

due proofs of its organization under the same." The act granted privileges usually contained in right of way acts, among others the right to take for railroad uses public lands adjacent to the right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, terminal and other legitimate purposes. It also provided for filing of plat of survey which should "have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way." The record presented here does not show to what extent the companies named herein have complied with the requirements of this right of way act in respect to their incorporation and organization, and, indeed, the ascertainment of that question is not essential to the determination of this case, but the construction and operation of the line of railroad is presumably under authority of said act as, apparently, there is no other authority. In this connection it may be stated, however, that the decision of your office in favor of the company is "subject to the condition that the proof to be filed with you by said applicant shall embrace a certified copy of its charter, with evidence of full compliance with all legal requirements affecting its powers, privileges, and standing in Alaska, and also its due succession to the rights and property of the Nome Arctic Railroad Company." Nor is it material to determine in this connection under what authority, if any—whether the act of June 6, 1900 (31 Stat., 321), entitled "An act making further provision for a civil government for Alaska and for other purposes," contains such authority—the city Council of Nome granted franchise to the Nome Arctic Railroad Company, immediate grantor of the Northwestern Development Company, to extend the line of railroad within the city limits. This grant by the Council is only important as showing that the company thus extending the line of road was not a trespasser so far as the municipality is concerned.

The act of March 3, 1891, *supra*, reads as follows:

That until otherwise ordered by Congress lands in Alaska may be entered for town site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory.

Section 2387 of the Revised Statutes provides that "Whenever any portion of the public lands have been or may be settled upon

and occupied as a town site" entry may be made of "the land so settled and occupied in trust for the several use and benefit of the occupants thereof according to their respective interests." The portions of the regulations issued August 1, 1904 (33 L. D., 163), under the act of March 3, 1891, amendatory of said section, and pertinent to this issue, are as follows:

When the plat and field notes of the survey of the exterior lines of any town site shall have been approved, the Secretary of the Interior will appoint one trustee to make entry of the tract so surveyed in trust for the occupants thereof, as provided in said act . . . The entry having been made . . . the trustee will cause an actual survey of the lots, blocks, streets and alleys of the town site to be made, conforming as near as in his judgment it is deemed advisable to the original plan of survey of such town and the individual holdings as shown by the recorded titles and the improvements thereon . . . and designate upon such plat the lots occupied and improved, together with the value of the same, and the name of the owner or owners thereof; and in like manner he will designate thereon the lots occupied by any corporation, religious organization, or private or sectarian school . . . The trustee . . . will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, blocks or grounds to which each occupant thereof shall be entitled under the provisions of said act. . . . The trustee will proceed . . . to set apart to the persons entitled to receive the same the lots, blocks, and grounds to which each person, company, or association of persons shall be entitled according to their respective interests . . . Only those who were occupants of lots or entitled to such occupancy at the date of entry, or their assigns thereafter are entitled to the allotments herein provided . . . No limitation is placed by statute on the number of lots that may be awarded to any one person, except that he must be an occupant or entitled to such occupancy in the sense of the law on the day of entry of each lot awarded to him.

In the course of a letter dated July 28, 1905, in response to request of the trustee of Nome town site for instructions as to certain features of his trust, your office stated:

You also state that some lots are occupied by "the pipe lines of the Moonlight Water Company and Nome Exploration Company and other lots by the tanks of the latter company, and also a considerable number of lots by "the Nome Arctic R. R. Company's tracks," and the R. R. company is also claiming other lots in "close proximity to the track." You say you see no objection to the R. R. and pipe line company's taking the lots their construction is on.

It is questionable whether the railroad and pipe line companies can be considered as occupants of town property within the intentment of their charters, the Alaskan town site law, and the acts of May 14, 1898 (30 Stat., 409), and Chap. 22, act of June 6, 1900 (31 Stat., 522), whereby they can gain title to land in townsites in fee simple. You are therefore directed to transmit to this office all applications and proofs submitted by any such company upon receipt of the same, with your recommendation, and issue no deeds for lots affected by such pipe and R. R. lines until directed by this office.

Pursuant to the foregoing instructions the trustee on June 21, 1906, forwarded to your office applications filed by the North-

western Development Company for certain designated lots in the town site of Nome. Among other things he stated:

The company has not presented any evidence showing what lots it claims by purchase included in either application. As there can be no doubt, I conclude, of its right to demand my deed for such tracts as they have acquired by purchase from the occupants, this is not important at this juncture, as the real question is its right to claim others as original occupants by reason of the construction of its line over vacant ground.

Referring to the regulations of August 1, 1904, *supra*, which required him to designate upon the plat "the name of the owner or owners thereof; and in like manner he will designate thereon the lots occupied by any corporation, religious organization or private or sectarian school," the trustee further stated:

For this reason the line of the railroad as it traverses the lots was placed on the plat, and after this was done and before it was approved, at the request of the predecessor of the present applicant those lots over which the track passed were marked on the plat, and written in the tract book, to the railroad company.

Your office in reply to the trustee, under date of May 22, 1907, after discussing the distinction drawn by him between the right of the Northwestern Development Company as a purchaser from occupants and as an original occupant itself, stated:

In view of the doubt generally expressed by this office in said letter "G" of July 28, 1905, as to whether the companies mentioned could be considered "as occupants of town property," I deem it pertinent to say that I entertain no doubt as to the right of any corporation, private or quasi public, to become an occupant within the meaning of the town site law, of lots used and improved by it for purposes aside from strict "rights of way," and for which purposes the right to purchase realty ordinarily exists at law. Nor could there be objection to your deeding to a corporation without regard to the nature of its use thereof, after date of town site entry, any town lot duly assigned to it by a rightful occupant at said date.

With the foregoing views the Department readily concurs. It may be accepted that the company is entitled to such lots as it acquired by purchase from those who were *bona fide* occupants at date of the town entry, and also to such lots as were at that time occupied and improved by it within the meaning of the town site act aside from its right of way privilege proper. On the main question at issue, namely, whether the construction and maintenance under the right of way act of the line of railroad across lands that subsequently became town lots, constituted such occupancy within the meaning of the town-site act as to vest in the constructing company and its successors in interest the right to deeds to said lots from the town-site trustee, your office held:

On the whole, I see no reason in law or public policy opposing the conclusion that said tracks amounted to sufficient occupation of these lots in the sense of the law.

In the view of your office the right of way act of May 14, 1898, has no bearing on the question involved herein. Nevertheless, it is clear that whatever rights these companies had at the date of the town-site entry were evidently under that act; in other words, if they were occupants in any sense of town lots they were only such occupants by reason, primarily, of the line of road constructed under the right of way privilege gained under said act. The theory of your office appears to be that the lands of a town site once patented to the town-site trustee are no longer public domain subject to railroad right of way; that the creation of the town with a line of railroad at the time constructed and operated across its lots gives to the owners of such road, along with other town occupants, a right to a trustee's deed to such lots; that the town-site act is exclusive in its operation affording the only means to the railroad for obtaining right of way; and that whereas before town-site entry and patent the right of the railroad was limited to a mere easement under the right of way act, thereafter the right of the owners of such railroad became one of fee simple title under the town-site act. This view presupposes that the government title to public lands out of which the town site is created passes absolutely to the trustee upon issuance of patent, thus losing their character of public lands, and that entirely new conditions are imposed upon property rights and privileges theretofore existing. The town site act, however, merely recognizes such rights as existed at date of town site entry. For instance, it did not change the status of the railroad companies in this case under the right of way act. If that status was a right of easement merely it remained so and the owners were entitled to recognition and protection accordingly. If it was one of occupancy it entitled the owners to the same rights accorded to other occupants under the town site act. It is thus entirely possible, according to circumstances, for the railroad owners both to maintain rights under the right of way act and also acquire others under the town-site act.

As to the effect of the issuance of patent to the town-site trustee, reference may very pertinently be made here to departmental instructions of March 15, 1892 (14 L. D., 295), under the Oklahoma Town Site Act of May 14, 1890 (26 Stat., 109), which provides for entry of lands as town sites "for the several use and benefit of the occupants thereof." It was held in those instructions that the issuance of patent to town-site trustees is not a disposition of the government title but a conveyance in trust to be held under the direction of the Secretary of the Interior. Reference was made to these instructions in the case of *McDaid v. Oklahoma* (150 U. S., 209), where it was insisted that title of the United States passed by the patent to the trustees and that they held it thereafter in trust for the occupants free

from the control of the land department, but the court held, referring to section 2387 of the Revised Statutes—

By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the rightful claimants to the undisposed of or surplus lands are ascertained. The act did not contemplate that the allowance of the entry and the issue of the patent should operate to devolve the final determination of conflicting claims to lots upon these government appointees; and, until the trustees conveyed, the title did not pass beyond the control of the executive department in that regard.

See also case of *Bockfinger v. Foster* (190 U. S., 116), wherein it was held that town-site trustees did—

not hold an indefeasible title as of private right, with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the town-site boundary. The trust was not, in any sense, of a permanent character. Its creation by Congress was only a step towards the ultimate transmission of the title of the United States to occupants under the township [sic] act.

The act of March 3, 1891, does not define or specify the kind of occupancy required of the town-site claimant nor prescribe the value and character of his improvements. Therefore, with nothing in the act indicating the contrary, its language should be accorded the sense or meaning commonly understood by the words employed. The words used in the act to describe those whose rights are to be recognized thereunder, are "occupants" and "inhabitants," which are apparently used interchangeably. The regulations under the act speak in the same relation of "person," "persons," "occupants," "inhabitants," "companies," "corporations," "owner or owners," "association of persons," etc. As hereinbefore stated, a company or corporation may acquire and hold realty as a lot occupant under the Alaskan Town-site Act, although strict construction of section 2387 of the Revised Statutes, which provides that the town-site entry shall be made "in trust for the several use and benefit of the occupants thereof, according to their respective interests," might warrant limitation of right to purchase lots to individuals. In any event, the rights of the company must be acquired by processes similar to those applicable to other occupants. The character of occupancy required, it is believed, is clearly indicated and limited by the terms of the town-site act.

To be an occupant, the party must have the actual use or possession of the land. The acts necessary to constitute possession must, in a great measure, always depend upon the character of the land, the locality, and the object for which it is taken up. But in all cases where a party relies solely upon possession, there must be a subjection of the land to the will and control of the claimant. The occupant must assert an exclusive ownership over the land, and his acts must at all times be in harmony with his title. His possession must, in the language of the authorities, be apparent, open, notorious, unequivocal

pedis possessio, carrying with it the evidence and marks of ownership. (American and English Encyclopædia of Law, title "Townsites," Vol. 26, 2d Ed., page 311.)

In construing the Oklahoma Town-site Act, which provides for entry under section 2387 of the Revised Statutes, it was stated in the case of *Benson v. Hunter* (19 L. D., 290):

Primarily, the entry for a town-site is made by the trustees, "for the several use and benefit of the occupants thereof," which must mean good faith occupancy of the lot or lots either for the purpose of residence, or for conducting some sort of legitimate business thereon, such as a store, shop, office, bank, factory, etc.

And in the case of *Bender v. Shimer* (19 L. D., 363), it was held:

The occupancy required is an actual bodily presence of the claimant, or some one for him, on the lot or lots for which he seeks to secure title; or a purpose to enjoy, united with, or manifested by such visible acts, improvements or enclosures, as will give to the claimant the absolute and exclusive enjoyment of the possession thereof.

One who erects, or causes at his own expense to be erected, on a town lot, a building for the purpose of trade or business, is an occupant within the town-site law.

An occupant, within the meaning of the town-site law of Congress, is one who is a settler or resident of the town and is in the *bona fide* actual possession of the land at the time entry is made. [Words and Phrases Judicially Defined, Vol. 6, p. 4906.]

The word "inhabitants" used in the act carries greater significance, perhaps, than the word "occupant." It is ordinarily synonymous with "residents." Webster defines an "inhabitant" to be—

One who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor; as the inhabitant of a house or cottage; the inhabitants of a town, city, county, or state.

According to some of the decisions an inhabitant is one who, being a citizen, dwells or has his home in some particular town where he has municipal rights and duties and is subject to particular burdens. However, as the words "person" and "persons" have often been construed to include corporations, the word "inhabitants" has also been held to apply to "corporations." It will thus be seen that various definitions have been, under different conditions, given to the words used in the act, and while none of them may absolutely control here, yet certain fundamentals are apparent which are decisive of this case. The inherent idea in these definitions is that it "takes people to make a town."

The right of the Northwestern Development Company and its predecessors was originally fixed by the right of way and the lands embraced therein could not be appropriated as town lots, except as subject to such right of way. Before the subdivision of the town

into lots, streets and blocks the company's occupancy was limited to such right of way and as to lands outside thereof it obviously gained no rights by the construction of the line of road. Therefore, if it is an occupant outside of the right of way it became such only by the establishment of the town site and its subdivision into lots rather than by any positive action on the part of the railroad. It is not shown that the company was in possession of the lot in question or exercised control over it further than in the operation of its road across the same. In maintaining and operating its road the company only exercised dominion over the area within the right of way limits and such maintenance and operation were for strictly railroad purposes, the only incident attendant upon or intended by the grant under the right of way act. All lands not thus used, which were afterwards subdivided into town lots had no relation to the right of way and could not be used for such purpose. The use and possession of the area embraced in the right of way did not grow into or extend to occupancy and possession of the lots into which the adjacent lands were subsequently divided. While the Northwestern Development Company is no doubt an occupant of the town site of Nome by reason of running its line of road into and through the said town site, yet it is an occupant merely of this right of way which does not include a right to purchase a lot which merely happened to be traversed by its line of road. Such right is only acquired by the use and possession of land as any other occupants, which is a matter entirely separate and distinct from strictly railroad purposes. Therefore, a line of railroad crossing a lot is not such occupancy thereof as is contemplated by the town-site act. So that, while the building of the road antedated Bovey's settlement, the right of the company being a mere easement was no bar to such settlement which was made subject only to the right of way.

The decision of your office is hereby reversed.

NORTHERN PACIFIC GRANT—INDEMNITY—JOINT RESOLUTION OF MAY
31, 1870.

NORTHERN PACIFIC RAILWAY COMPANY.

Lands embraced within the grant made by the act of May 4, 1870, in aid of the construction of the Oregon Central railroad, were not public lands within the meaning of the grant to the Northern Pacific Railway Company made by the joint resolution of May 31, 1870, and were therefore excepted from the operation of that grant.

The joint resolution of May 31, 1870, made a grant of second indemnity lands along that portion of the line of the Northern Pacific railroad between Portland, Oregon, and Puget Sound.

Losses within the primary limits of the grant made by the joint resolution of May 31, 1870, occurring after the date of the grant and prior to the definite location of the line of road, furnish a proper basis for the selection of lands from the second indemnity belt opposite thereto.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 24, 1908.* (G. B. G.)

This is the appeal of the Northern Pacific Railway Company from your office decision of June 9, 1908, holding for cancellation the company's indemnity list, No. 41, embracing certain tracts of land aggregating 5741.88 acres in the Portland land district, Oregon.

This land lies opposite to and coterminous with the line of the Northern Pacific railroad as constructed between Portland, Oregon, and Puget Sound, and within the second indemnity limits recently established by your office on account of said line. The western terminus of the grant made to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat., 365), was fixed by that act at some point on Puget Sound for the main line of the road and at a point at or near Portland, Oregon, for the branch line, such branch line to approach Portland from the east by way of the valley of the Columbia River. There was therefore no authorization by said act for the construction of a line of road between Portland and Puget Sound and no grant of lands thereby made on account of such line. But the joint resolution of May 31, 1870 (16 Stat., 378), made a grant to the same company which designated the Columbia River route as the main line of the road and extended such main line from Portland to some point on Puget Sound, and authorized the construction of a branch line from a convenient point on its main line across the Cascade Mountains to Puget Sound.

The lands involved are not therefore within the limits of the grant made by the act of July 2, 1864, but are within the second indemnity limits recently established by your office for the line from Portland to Puget Sound on account of the grant made to the company by the joint resolution of 1870, and have been selected thereunder.

The tracts designated as the basis for said selection are within the primary limits of said grant of May 31, 1870, and opposite that portion of the road definitely located September 13, 1873. They are also within the primary limits of a prior grant of May 4, 1870 (16 Stat., 94), to the Oregon Central Railroad Company and are opposite the portion of road definitely located thereunder February 2, 1872. This portion of the Oregon Central railroad was never constructed and the grant appertaining thereto was forfeited and the lands restored to the public domain by the act of January 31, 1885 (23 Stat., 296).

Your office, treating this list as a list of second indemnity selections, held that in order to support such selections the land in lieu of indemnity so taken must have been lost to the grant after the date of the grant and prior to the definite location of the line of road, and that inasmuch as in said list of selections the lands designated as lost had been disposed of prior to the passage of the joint resolution of May 31, 1870, they did not constitute a valid basis for such selections.

Thus stated, there are three questions presented by this record: First, were the lands designated as bases for the selections in question lost to the grant made by the joint resolution of May 31, 1870? Second, did the resolution of May 31, 1870, make a grant of second indemnity lands on account of that portion of the road between Portland, Oregon, and Puget Sound? Third, is the Northern Pacific Railway Company entitled on account of its grant made by said resolution to resort to a second indemnity belt opposite thereto in satisfaction of losses after the date of the grant and prior to definite location of the line of road?

The first question has been definitely settled by decision of the Supreme Court of the United States in the case of *United States v. Northern Pacific Railroad Company* (152 U. S., 284), wherein it was held that lands covered by the act of May 4, 1870, granting lands in aid of the construction of the Oregon Central railroad, were not public lands within the meaning of the grant of May 31, 1870, to the Northern Pacific Railroad Company, and were, consequently, excepted out of that grant as having been previously disposed of by the United States.

The other two questions are new and involve a study of some of the provisions of both the act of 1864 and the joint resolution of 1870. The act of 1864, which is referred to in the joint resolution of 1870 as the company's charter, authorized the Northern Pacific Railroad Company to build a continuous railroad line from a point on Lake Superior in the State of Minnesota or Wisconsin "to some point on Puget Sound, with a branch *via* the valley of the Columbia River to a point at or near Portland in the State of Oregon." The third section of the act granted to said company—

every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said

time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

The joint resolution of May 31, 1870, authorized the same company—

to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and, in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch * * * to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July second, eighteen hundred and sixty-four.

Inasmuch as, as has been seen, the act of July 2, 1864, did not make a grant of any sort on account of the line from Portland to Puget Sound, it is difficult to perceive why Congress should have made a grant of second indemnity on account of that line by the joint resolution of 1870. It was a new line and said joint resolution made a new grant. The obvious theory upon which the second indemnity grant to the Northern Pacific railroad company was made would seem to be that the sales and dispositions by the United States of lands within the limits of the grant of 1864 had depleted the grant to such extent as to impair rights of the company which it was the intention of the government to measurably conserve. But these considerations could not have controlled in the making of a new grant. There was no obligation, legal or equitable, resting upon the government to make a grant of second indemnity lands where no grant had theretofore existed, and where theretofore there had been no disposition of lands which would have otherwise accrued to the company. Nor yet is it reasonable to suppose that it was the intention of Congress to make a grant of second indemnity where no grant had theretofore subsisted, but, however this may be, and to what extent such considerations may be indulged as aids to statutory construction, they do not warrant conclusions which would do violence to the plain letter of the statute, and the statute of 1870 seems plain. It author-

izes the company to construct its main line by way of the Columbia River to Puget Sound. This makes the line from Portland to Puget Sound part of its main line, and it is provided that in the event of there not being within any state in which said main line may be located "the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then the said company shall be entitled . . . to receive so many sections of land . . . within ten miles on each side of said road beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch."

It will be observed that the grant is for the whole of the main line as thereby constituted. No difference is made or indicated between the old main line and the new one. The grant of second indemnity is on account of deficiencies "*on said main line*" and there is no language indicating a purpose to exclude any portion of it. The language therein, "the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter," refers to the measure of the grant made by the act of 1864 within lateral limits and has no reference to terminal points.

To argue otherwise is to say that no grant of lands of any sort was made on account of the line of road between Portland and Puget Sound, for if the limits prescribed by the company's charter refer to terminal limits, then the joint resolution of 1870 can not in terms or by necessary implication be said to make a grant on said line either in place or for indemnity. On the other hand, it must be said that if a grant of lands was made on account of that line at all, there was just as surely a grant of second indemnity lands as of lands in place.

The lands designated in support of the selections in question having been lost to the grant made by the joint resolution of May 31, 1870, there can be little doubt that the Northern Pacific Railway Company, being the successor in interest of the Northern Pacific Railroad Company, is entitled to indemnity therefor. They had been "granted" to the Oregon Central Railroad Company May 4, 1870, which was "subsequent to the passage of the act of July two, eighteen hundred and sixty-four," and therefore come literally within the descriptive terms of the lands on account of which the second indemnity grant was made. It is not material that the line of the Oregon Central road opposite these lands was not definitely located until after the grant of May 31, 1870, it appearing that this definite location was prior in point of time to the definite location of the Northern Pacific line opposite the same land.

The decision appealed from is reversed and the case remanded with direction to forward said list for approval unless objection appears other than herein considered.

TEMPORARY WITHDRAWAL—AUTHORITY OF SECRETARY TO MAKE—
NATIONAL FORESTS.

JOHN M. KANE.

The Secretary of the Interior has authority to make temporary withdrawals of public lands for the purpose of making examination thereof to determine the propriety of embracing them within the limits of a national forest.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 25, 1908.* (J. F. T.)

April 10, 1908, John M. Kane filed application to make desert land entry for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 17, T. 7 S., R. 32 E., M. D. M., containing 160 acres, Independence, California, land district.

On the same day, said application was rejected by the local officers, giving as the reason therefor the following statement:

The land in question was temporarily withdrawn from all forms of entry by letter "L" of February 20, 1907, General Land Office series, with a view to its being included in a proposed extension of the Sierra National Forest.

Upon appeal to your office, the action of the local officers was affirmed, and the said application rejected by your decision of September 1, 1908, in words as follows:

It appears from the records of this office that, by office letter "L" of February 20, 1907, you were instructed that, on February 16, 1907, the Secretary of the Interior temporarily withdrew from any disposition whatever, under the public land laws, and until further ordered by the Department, as a proposed addition to the Sierra Forest Reserve, certain described lands, including the land applied for, as aforesaid. This withdrawal was made permanent by the Executive Order of April 20, 1908, and the tract has been since made a portion of the Inyo National Forest, by an Executive Order of July 1, 1908.

The applicant and his resident attorneys argue at considerable length that, (1) at the date the application was filed there was no adverse claim to the land and it was of the character contemplated by the laws under which the application was made; (2) that the land, being desert land, is not of the character contemplated by the act of March 3, 1891 (26 Stat., 1095) and the act of June 4, 1897 (30 Stat., 11), as land which may be included in a forest reserve; (3) that the temporary withdrawal of lands by the Department, with a view to their inclusion in a national forest, is without authority, in the face of the expressed statutory declaration that forests may be created only by the Proclamation of the President (see acts above cited). Accordingly, the conclusion is reached by the applicant and his attorneys that the withdrawal in this case was illegal and without authority and constituted no bar to the allowance of the application (see act of February 1, 1905, 33 Stat., 628).

A detailed consideration of these propositions and a decision upon the issue at law raised by them should not and cannot be made by this office. It is the duty of this office to see that the order of withdrawal of the Secretary of the Interior of February 16, 1907, is strictly obeyed.

Accordingly, your decision of April 10, 1908, must be, and hereby is, affirmed, and the application to enter is rejected, subject to the applicant's right to appeal herefrom to the Secretary of the Interior.

The above written matter constitutes a sufficient statement of the facts in the case.

Applicant has appealed to the Department, making the same contentions presented to your office and set forth in your decision.

The authority of the President to create forest reservations (now called national forests) under the provisions of the act of March 3, 1891 (26 Stat., 1095), and the act of June 4, 1897 (30 Stat., 11), cannot be questioned. This authority necessarily carries with it the power to take the steps, and do the acts, required in the execution of the contemplated act in a reasonable way and manner. Private entries upon the land must cease at some date. It is contended that the temporary withdrawal from entry or termination of the right of private entry, should be made and the date thereof fixed by proclamation of the President, and not in the usual way of making withdrawals by the Secretary of the Interior.

This contention is without merit. No rights would be affected by the change.

The President acts in many cases through the heads of Departments and the act of the Secretary of the Interior making the temporary withdrawal of this land, afterwards included in a national forest, may well be and should be considered as done by the direction of the President and to be, by law, his act. (*Wilcox v. Jackson*, 38 U. S. 498; *Wolsey v. Chapman*, 101 U. S., 755.)

Nothing is found in the cases cited in brief of appellant, nor elsewhere, to controvert the views and principles above expressed.

The action complained of in temporarily withdrawing from private entry the land in question, while making examination thereof to determine the propriety of embracing the same within the limits of a proposed national forest, is believed to have been in accordance with a sound and provident administration of public affairs.

Your decision is affirmed.

ROSEBUD INDIAN LANDS—STATE SELECTIONS OF INDEMNITY SCHOOL LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 28, 1908.

REGISTER AND RECEIVER,
Chamberlain, South Dakota.

GENTLEMEN: Section 1 of the act of Congress approved March 2, 1907 (34 Stat., 1230), provides:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of all that portion of the Rosebud Indian Reservation in South Dakota lying south of the Big White River

and east of range twenty-five west of the sixth principal meridian, except such portions thereof as have been, or may hereafter be, allotted to Indians: *Provided*, That sections sixteen and thirty-six of the lands in each township shall not be disposed of, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose.

Section 6 of said act reads as follows:

That sections sixteen and thirty-six of the lands in each township within the tract described in section one of this act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose; and in case any of said sections, or parts thereof, are lost to said State of South Dakota by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the tract described herein, to locate other lands not occupied not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

The State's right of selection, under the provisions of this act of March 2, 1907, is restricted to lands "not occupied," and not exceeding two sections (1,280 acres) in area in any one township, within the boundaries of the tracts described therein, in lieu of lands of equal acreage in school sections 16 and 36, within said tract, lost to the State by reason of allotments to Indians, or otherwise. The selections must be made prior to the opening of the lands to settlement.

The President, in proclamation of August 24, 1908 (37 L. D., 122), names March 1, 1909, as the first day for making entries under the provisions of the said act, and that date must be considered, for the purpose of State selection, as the date of the opening of the lands to settlement.

The selections should be made on the forms used for the selection of indemnity school lands, so modified as to show that applications are made under the provisions of the act of March 2, 1907, and must be supported by the usual non-mineral, non-saline and non-occupancy affidavits.

In view of the fact that claims to these lands by allotment are record claims, and that the unallotted lands will not be subject to homestead settlement during the period within which the State is authorized to exercise the right of selection, the requirement of publication of notice of selection will be waived, and, as the tracts to be designated as bases for the selections are lost to the State by allotment, or otherwise, no certificates of county officers showing non-sale and non-encumbrance, by the State, of such base tracts, need be furnished.

Lists of selections of the lands considered herein, accepted by you, will be given proper serial numbers and will be transmitted to this

office in special letters. Care must be taken to place notations, showing the fact and date of transmittal, in each case, in the column for remarks in the "schedule of serial numbers" for the month in which the lists are accepted and transmitted.

There is inclosed herewith, for your information and the files of your office, a copy of office letter "G" addressed to the Governor of South Dakota, November 20, 1908; also a copy of a list intended to show all the allotted lands within the area proposed to be opened, and, in addition, certain tracts which, it appears from a memorandum furnished by the Indian Office, are involved in court proceedings, in what is known as the Sully suit.

Copies of schedules of allotments made within the last few months and of recent changes in allotments, are now being prepared, and will be mailed to you in the near future. See that these allotments and changes are promptly placed of record in your office.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

FRANK PIERCE, *Acting Secretary*.

**SILETZ INDIAN LANDS—TRANSFER OF CLAIM UNDER ACT OF
JULY 1, 1898.**

ROBERT BLAIR.

There is nothing in the act of August 15, 1894, providing for the opening of lands in the Siletz Indian reservation, to prevent a settler on an odd-numbered section within the limits of the grant to the Northern Pacific Railway Company, who relinquished his rights under the provisions of the act of July 1, 1898, from transferring his claim to lands within that reservation, with credit for residence on the relinquished lands.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 30, 1908.* (C. J. G.)

An appeal has been filed by Robert Blair from the decision of your office of March 13, 1908, rejecting his lieu selection application as individual claimant under the act of July 1, 1898 (30 Stat., 597, 620).

Blair filed relinquishment of his claim by settlement under the homestead law to the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 25, T. 2 N., R. 2 E., Vancouver, Washington, which was accepted by your office February 19, 1906, and he was at the same time permitted to transfer his claim to an equal quantity of land under the provisions of the act of July 1, 1898.

April 11, 1906, the local officers transmitted the application of Blair to select lot 4, Sec. 3, T. 10 S., R. 11 W., Portland, Oregon, in

lieu of the land relinquished. The said lot appearing from the records to be free from conflicting claims, your office on August 14, 1906, approved the selection. It appeared that Blair never made proof or entry for the land embraced in his original claim and he was accordingly advised by your office that he would "be required to proceed in accordance with the instructions contained in the circular letter of June 5, 1906, and make the proof prescribed therein before he can obtain title to the land selected by him." It was subsequently discovered that lot 4 is within the Siletz Indian Reservation, the unallotted lands of which were ceded to the United States under agreement ratified and confirmed by the act of August 15, 1894 (28 Stat., 286, 326), and opened to settlement July 25, 1895, under the President's proclamation of May 16, 1895 (20 L. D., 476, 478). In view of the provisions of said act your office held in the decision now under consideration that lot 4 is not subject to Blair's lieu selection, which is based upon residence upon other land. Your office therefore revoked its action of August 14, 1906, and rejected Blair's application for said lot.

The act of August 15, 1894, provides:

The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the townsite law and under the provisions of the homestead law: *Provided, however*, That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

The part of the act of July 1, 1898, under which Blair claims the right of transfer is as follows:

That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company, the same as if made upon the tract to which the transfer is made.

The provisions of the act of July 1, 1898, were, by the act of May 17, 1906 (34 Stat., 197), with the exception that the lieu selections made under the provisions of the later act are confined to lands within the State where the relinquished lands are situated, extended to include any *bona fide* settlement or entry made subsequent to January 1, 1898, and prior to May 31, 1905, "where the same has not since been abandoned." The relinquishment of Blair's original claim was accepted February 19, 1906. The circular letter of June 5, 1906, unpublished, addressed to registers and receivers, in respect to individual lieu selections under the act of July 1, 1898, reads:

In the selection of lieu lands by individual claimants under the act of July first, eighteen hundred and ninety-eight (30 Stat., 597, 620), where the original claim has been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, no second homestead entry and final certificate will be required, but patent will issue to the claimant upon his lieu selection, when approved by this office (See James A. Bryars, 34 L. D., 517). Where the original claim has not been carried to final entry and certificate or to the submission of final proof entitling the claimant to final entry and certificate, said claimant, if he has completed the residence and improvements required by the law, will be required to make proof thereof in the usual manner, whereupon the transfer may be made as in other completed series. In cases, however, where the residence and improvement on the original claim have not been completed, the claimant, after the selection shall have been approved by this office, will be required to make homestead entry of the selected tract and reside upon and improve the same for the period, which, together with the residence and improvements made on the original tract, is required by the homestead law. Thereafter, he will be required to make proof upon both the original tract and the land selected in lieu thereof, which, if satisfactory, you will accept, and upon payment of the final fees and commission issue final certificate.

It is urged in the appeal that under decision in the case of James A. Bryars (34 L. D., 517), Blair should be allowed to make second homestead entry for the lot in question and final proof thereon by showing compliance with the homestead law on his original claim. That case involves the act of February 24, 1905 (33 Stat., 813), providing for the transfer of claims, with credit for residence and improvements by certain homesteaders within the limits of the grant to the Mobile and Girard railroad whose entries were canceled because of a superior claim through purchase from the railroad company. Reference is also made in the appeal in connection with the Bryars case, to the act of March 4, 1907 (34 Stat., 1408), and the regulations thereunder (35 L. D., 502, 508), which is amendatory of the act of February 24, 1905. The acts of February 24, 1905, and March 4, 1907, provide in part:

Such homesteader is hereby accorded the privilege of transferring his claim thus initiated under the homestead laws to any other nonmineral unappropriated public land subject to homestead entry, with full credit for the period

of residence and for the improvements made upon his homestead hereinbefore first described prior to the order of its cancellation, provided he has not forfeited or voluntarily abandoned his homestead claim.

The Bryars case did not involve the question of transfer of claim to lands within an Indian reservation, the manner of whose disposal is provided for by special legislation, and the reference to that case in the circular letter of June 5, 1906, is confined to the rule governing the selection of lieu lands by individual claimants under the act of July 1, 1898, "where the original claim has not been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate."

The act of August 15, 1894, requires a settler on lands in the Siletz Reservation to pay fifty cents per acre therefor at the time of making the original entry and the further sum of \$1.00 per acre at time of final proof, to be made within five years from date of entry, and the act further provides that three years' actual residence shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

It is in view of these requirements that your office holds that the land in question is not subject to Blair's lieu selection, he claiming credit for residence on the land relinquished by him under the act of July 1, 1898.

As to payments required under the act of August 15, 1894, the act of May 17, 1900 (31 Stat., 179), known as the "Free Homesteads Act," provides:

That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract so entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry.

It is clear that settlers on lands within the Siletz Indian Reservation, the same having been acquired from an Indian tribe prior to the act of May 17, 1900, are entitled to the benefits of said act. The only question therefore is whether persons claiming settlement on odd-numbered sections, within the limits of the grant to the Northern Pacific Railroad Company, can transfer their claims under the act of July 1, 1898, to lands within said reservation with credit for residence on the relinquished lands. As to such settlers the act provides that in making proof "credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the

land grant to the said Northern Pacific Railroad Company, the same as if made upon the tract to which the transfer is made."

The rule that where Congress has declared lands to be subject to disposal in a specified manner, this Department has no authority to dispose of them in a different manner, has been recognized and applied in various departmental decisions, but a different disposal of lands is not sought nor involved in this case. The character of the relinquished and lieu lands is the same, namely, lands subject to entry under the homestead laws, and the same requirements as to residence and improvements are imposed by law in both classes. It is true that actual residence is required by the act of August 14, 1894, but similar showing must also be made as to the relinquished land before a transfer or claim to any other land can be allowed or is authorized under the act of July 1, 1898. As bearing upon this question the act of June 4, 1897 (30 Stat., 36), provides:

That in cases in which a tract covered by an unperfected *bona fide* claim . . . is included within the limits of a public forest reserve, the settler . . . may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement . . . *Provided further*, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvement, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

In the case of Frank F. McCain (34 L. D., 126), application was made under said act to select a tract within the Columbia Indian Reservation, in lieu of an unperfected settlement claim within a forest reserve. The land applied for became subject to disposal under the act of July 4, 1884 (23 Stat., 76, 79), which provided that after allotments to Indians "the remainder of said reservation to be thereupon restored to the public domain and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may be subject to sale under the laws relating to entry of timber lands and of mineral lands, the entry of which shall be governed by the laws now in force concerning the entry of such lands."

It was held in that case that the provision in the act "to actual settlers under the homestead laws only," was no bar to a selection of a portion of said lands in lieu of an unperfected claim to lands in a forest reserve based upon homestead settlement and relinquished under the act of June 4, 1897. See also case of John W. Leslie (36 L. D., 28).

The decision of your office herein is reversed and in the absence of other objection Blair will be allowed to transfer his claim in accordance with the circular letter of your office of June 5, 1906.

MILITARY BOUNTY LAND WARRANT—UNOFFERED LAND—EQUITABLE ACTION.

SANDY D. BULLOCK.

After the passage of the act of March 2, 1889, withdrawing the public lands of the United States, except in the State of Missouri, from private sale, the land department was without authority to permit private cash entry for lands outside of that State, and an entry so allowed is not subject to confirmation by the Board of Equitable Adjudication.

A private cash entry allowed prior to the act of March 2, 1889, for lands which had never been offered at public sale, is void and not subject to confirmation by the Board of Equitable Adjudication, notwithstanding the land should theretofore have been offered but through inadvertence was omitted from the offering.

Roy McDonald, 34 L. D., 21, overruled.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, November 30, 1908.* (E. F. B.)

This appeal is filed by Sandy D. Bullock from the decision of your office of August 14, 1908, holding for cancellation the location made by him of the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 29, T. 5 S., R. 12 E., New Orleans, Louisiana, with survey-generals' scrip, upon the ground that said tract was not offered land at the date of the act of March 2, 1889 (25 Stat., 854), withdrawing all public lands from private cash entry, except in the State of Missouri, and was therefore not protected by the ruling of the Department in the case of Roy McDonald (36 L. D., 205), or validated by section 12 of the act of May 29, 1908 (35 Stat., 465).

When this case came before the Department upon the appeal of Bullock from your decision of April 22, 1908, holding said location for cancellation, it could not from the record then before the Department be determined whether the land in question had in fact been offered under the proclamation of May 8, 1879, offering certain lands in Louisiana at public sale. The case was therefore remanded for further investigation by decision of July 11, 1908, and you were directed to dispose of the same under the views announced therein. Sandy D. Bullock (37 L. D., 23).

This land was not included in the lists of lands that were to be offered under the proclamation of May 8, 1879, giving notice of a sale of public lands to be made on August 26, 1879, for the reason that at the time the lists were made out the tract in question was covered by the homestead entry of one Hugh J. Campbell, made February 4, 1871, which was canceled December 8, 1878, after the lists mentioned were prepared.

The act of July 4, 1876 (19 Stat., 73), declared that the public lands in said State shall be offered at public sale as soon as practicable after the passage of said act, "and shall not be subject to private entry until they are so offered." It is evident that this land was not offered after the act of July 4, 1876, was passed, and was not subject to private cash entry at the date of the act of March 2, 1889, whatever may have been the cause of such failure to offer it.

It is urged in the appeal that, as the entry had been canceled prior to the date of sale, there was no obstacle to the offering of the land, and that the case should be submitted to the Board of Equitable Adjudication under Rule 11, authorizing the submission to the Board for confirmation all private sales of tracts which had not been previously offered at public sale, but where the entry appears to have been permitted by the land officers under the impression that the land was liable to private entry and was made in good faith. In this connection, attention is called to the decision of the Department in the case of Roy McDonald (34 L. D., 21), holding that where the only objection to confirmation of a military bounty land warrant made in good faith is the purely technical one that through inadvertence of the land department the land located had never been formally offered at public sale, of which fact the locator was ignorant, the location may be referred to the Board of Equitable Adjudication under Rule 11.

Whatever may have been the scope of said rule in its application to entries made prior to the act of March 2, 1889, at a time when offered public lands of the United States could be purchased at private cash entry under the system then in force, it is evident that it has no application to entries made since the passage of that act, which withdrew absolutely from private sale all public lands of the United States, except in the State of Missouri, whether they had been offered or not, and thereafter the land department was without authority to allow entry of any lands in the State of Louisiana at private sale.

Under the law in force prior to the act of March 2, 1889, providing for public sales and private cash entries of the public lands, it was a fundamental principle that private sales were never permitted until after the lands had been exposed to public auction, at a price for which they were afterwards subject to entry, and that a private sale of land made before it had been so offered was void. *Eldred v. Sexton* (19 Wall., 189.)

The authority of the Board of Equitable Adjudication to confirm private sales of lands where the lands had not been previously offered rested mainly upon the general law providing for the disposal of public lands at private sale. It was only when some essential step

required by law to subject lands to private entry had been omitted that their jurisdiction was invoked and exercised, but it rested upon the general law authorizing such sales as part of the system for the disposal of the public lands.

Mere inadvertence in failing to offer a tract at public sale would not under the former system of disposing of lands at public and private sale subject the tract to disposal at private sale. The question is not whether the land should have been offered, but whether it had been in fact actually offered. After the abolition of the system, the land department was prohibited from disposing of lands at private sale, and it could not evade the law by submitting an entry to the Board of Equitable Adjudication for confirmation, which would be doing indirectly what it was forbidden to do directly. As the ruling of the Department in the case of Roy McDonald, decided July 12, 1905 (34 L. D. 21), is in conflict with this view, it is hereby overruled.

In the case of Victor H. Provensal (30 L. D., 616) it was held that it was not the purpose of the act of March 2, 1889, to nullify the right conferred by the act of June 2, 1858, authorizing the issuance of surveyor-generals' scrip, by withdrawing from location with such scrip any lands that were at the date of that act (March 2, 1889) subject to purchase at private sale. It held that such lands continued to occupy that status, so far as to authorize location of them with such scrip, but to bring any tract of land within that ruling it must have actually been offered at the date of the act withdrawing from private cash entry all public lands of the United States, whether offered or unoffered.

Later, upon a reconsideration of this question, it was held in the case of Lawrence W. Simpson (35 L. D., 399, 609) that the withdrawal from private cash entry of all public lands, except in the State of Missouri, by the act of March 2, 1889, was a prohibition against the disposal of any lands in the States not excepted by the location of any warrant or scrip that was locatable only on lands subject to private cash entry. But, as locations had been allowed upon the faith of previous rulings, the Department in the case of Roy McDonald, decided December 21, 1907 (36 L. D., 205), modified the later Simpson case by recognizing all locations made with military bounty land warrants or with surveyor-generals' scrip prior to that decision, and upon faith in the ruling of the Department in the cases of Victor H. Provensal, J. L. Bradford (31 L. D., 132), and Charles P. Maginnis (Ib., 222), and under the saving paragraph of the original decision in the Simpson case (35 L. D., 399). This ruling of the Department was confirmed by the act of May 29, 1908 (35 Stat., 465).

As no location of lands in Louisiana with surveyor-generals' scrip was recognized as valid by the Department under the decisions in the

case of Victor H. Provensal (30 L. D., 616), and other cases involving the same question, unless the land had actually been offered and was subject to private entry at the date of the act withdrawing the public lands of the United States, except in the State of Missouri, from private entry, and as no location is protected by the decision of the Department in the case of Roy McDonald (36 L. D., 205), or validated by the act of May 29, 1908, that was not made in accordance with the rulings of the Department in the Provensal case, your decision rejecting the location is affirmed.

REGULATIONS UNDER TIMBER AND STONE LAW.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 30, 1908.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The regulations under the act of June 3, 1878 (20 Stat., 89), and amendatory acts, commonly known as the timber and stone law, are hereby revised, modified, and reissued as follows:

PROVISION FOR APPRAISEMENT.

Any lands subject to sale under the foregoing acts, may, under the direction of the Commissioner of the General Land Office, upon application or otherwise, be appraised by smallest legal subdivisions, at their reasonable value, but at not less than \$2.50 per acre; and hereafter no sales shall be made under said acts except as provided in these regulations.

CHARACTER OF LANDS SUBJECT TO ENTRY.

All unreserved, unappropriated, nonmineral, surveyed, public lands within the public-land States, which are valuable chiefly for the timber or stone thereon and unfit for cultivation at the date of sale, may be sold under this act at their appraised value, but in no case at less than \$2.50 per acre, in contiguous legal subdivisions upon which there is no existing mining claim, or the improvements of any bona fide settler claiming under the public-land laws. The terms used in this statement may be defined substantially as follows for the purpose of construing and applying this law:

2. *Unreserved and unappropriated lands* are lands which are not included within any military, Indian, or other reservation, or in a national forest, or in a withdrawal by the Government for reclamation or other purposes, or which are not covered or embraced in any entry, location, selection, or filing which withdraws them from the public domain.

3. *Unoccupied lands* are lands belonging to the United States upon which there are no improvements belonging to any person who has initiated and is properly maintaining a valid mining or other claim

to such lands under the public land laws. Abandoned and unused mines, shafts, tunnels, or buildings occupied by mere trespassers not seeking title under any law of the United States, do not prevent timber and stone entries if the land is otherwise capable of being so entered.

4. *Nonmineral lands* are such lands as are not known to contain any substance recognized and classed by standard authorities as mineral, in such quantities and of such qualities as would, with reasonable prospects of success in developing a paying mine thereon, induce a person of ordinary prudence to expend the time and money necessary to such development.

5. *Timber is defined* as trees of such kind and quantity, regardless of size, as may be used in constructing buildings, irrigation works, railroads, telegraph and telephone lines, tramways, canals, or fences, or in timbering shafts and tunnels or in manufacturing, but does not include trees suitable for fuel only.

6. *Lands valuable chiefly for timber*, but unfit for cultivation are lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase, and therefore include lands which could be made more valuable for cultivation by cutting and clearing them of timber. The relative values for timber or cultivation must be determined from conditions of the land existing at the date of the application to purchase.

7. *Lands in all public land States* may be entered, but timber and stone entries can not be made in the Territories or in the District of Alaska.

BY WHOM ENTRIES MAY BE MADE.

8. One timber and stone entry may be made for not more than 160 acres (a) by any person who is a citizen of the United States, or who has declared his intention to become such citizen, if he is not under 21 years of age, and has not already exhausted his right by reason of a former application for an entry of that kind; or has not already acquired title to or is not claiming under the homestead or desert land laws through settlement or entry made since August 30, 1890, any other lands which, with the land he applies for, would aggregate more than 320 acres; or (b) by an association of such persons, or (c) by a corporation, each of whose stockholders is so qualified.

9. *A married woman may make entry if* the laws of the State in which she applies permit married women to purchase and hold for themselves real estate, but she must make the entry for her own benefit, and not in the interest of her husband or any other person, and she will be required to show that the money she pays for the land was not furnished by her husband.

METHOD OF OBTAINING TITLE.

10. *Any qualified person* may obtain title under the timber and stone law by performing the following acts: (a) Personally examining the land desired; (b) presenting an application and sworn statement, accompanied by a filing fee of \$10; (c) depositing with the receiver the appraised price of the land; (d) publishing notice of his application and proof; (e) making final proof.

11. *Examination of the land* must be made by the applicant in person not more than thirty days before the date of his application, in order that he may knowingly swear to its character and condition.

APPLICATION AND SWORN STATEMENT: DEPOSIT.

12. *The application and sworn statement must contain* the applicant's estimate of the timber, based on examination, and his valuation of the land and the timber thereon, by separate items. (See Form A, Appendix.) It must be executed in duplicate, after having been read to or by the applicant, in the presence of the officer administering the oath, and sworn to by him before such officer, who may be either the register or the receiver of the land district in which the land is located, a United States commissioner, a judge or a clerk of a court of record in the county or parish in which the land is situated, or one of these officers outside of that county or parish, if he is nearer and more accessible to the land than any other qualified officer, and has his office or place of business within the land district in which the land is located. Each applicant must, at the time he presents his application and sworn statement, deposit with the receiver, either in cash or in post-office money orders payable to the receiver, a filing fee of \$10.

13. *Applications by associations or corporations must*, in addition to the facts recited in the foregoing statement, show that each person forming the association or holding stock in the corporation is qualified to make entry in his own right and that he is not a member of any other association or a stockholder in any other corporation which has filed an application or sworn statement for other lands under the timber and stone laws.

DISPOSITION OF APPLICATION.

14. *After application and deposit have been filed* in proper form, as required by these regulations, the register and receiver will at once forward one copy of the application to the chief of field division having jurisdiction of the land described, who, if he finds legal objection to the allowance of the application, will return it to them with report thereon. The register and receiver will, if they concur in an adverse recommendation of the chief of field division, dismiss or

deny the application, subject to the applicant's right of appeal; but if they disagree with his recommendation, they will forward the record to the Commissioner of the General Land Office, with their report and opinion thereon, for such action as he may deem advisable.

If the chief of field division finds no such legal objection to the application, he shall cause the lands applied for to be appraised by an officer or employee of the Government. (Designation of Appraiser, Form B, Appendix.)

APPRAISEMENT: METHOD.

15. The officer or employee designated to make the appraisement must personally visit the lands to be appraised, and thoroughly examine every legal subdivision thereof, and the timber thereon, and appraise separately the several kinds of timber at their stumpage value, and the land independent of the timber at its value at the time of appraisement, but the total appraisement of both land and timber must not be less than \$2.50 per acre. He must, in making his report, consider the quantity, quality, accessibility, and any other elements of the value of the land and the timber thereon. The appraisement must be made by smallest legal subdivisions, or the report must show that the valuation of the land and the estimate of the timber apply to each and every subdivision appraised. (See Form C, Appendix.)

APPRAISEMENT: MANNER OF RETURN: APPROVAL.

16. The completed appraisement must be mailed or delivered personally to the chief of field division under whose supervision it was made, and not to the applicant. Each appraisement upon which an entry is to be allowed must be approved respectively or conjointly as provided in these regulations, by the chief of field division under whose supervision it was made, by the register and receiver who allow the entry, or by the Commissioner of the General Land Office.

APPRAISEMENT: DISAGREEMENT BETWEEN APPRAISING AND APPROVING OFFICERS: HOW DETERMINED.

17. The chief of field division will return to the appraiser, with his objections, an appraisement which he deems materially low or high, and the appraiser shall, within twenty days from the receipt thereof, resubmit the papers, with such modifications or explanations as he may deem advisable or proper, upon receipt of which the chief of field division will either approve the schedule as then submitted, or forward the papers to the register and receiver, with his memorandum of objection. The register and receiver will thereupon consider the case. If they approve the appraisement, they will sign the certificate

appended thereto, and advise the chief of field division thereof. If the register and receiver approve the objection of the chief of field division, they will so indicate, and if the appraising officer is an employee of the Interior Department, under the supervision of the chief of field division, they will return the papers to the chief of field division, who will thereupon order a new appraisement by a different officer. If, however, the register and receiver approve the objection of the chief of field division, when the appraiser is an officer of another bureau of this department, or of another department, they will forward the record of the case to the Commissioner of the General Land Office, who will then determine the controversy.

APPRAISEMENT: NOTATION AND EFFECT THEREOF.

18. *When the appraisement is completed*, the register and receiver will note the price on their records, and thereafter the land will be sold at such price only, under the provisions of the timber and stone acts, unless the land shall have been reappraised in the manner provided herein.

FAILURE TO APPRAISE: RIGHTS OF APPLICANT: HOW TERMINATED.

19. Unless the land department, as hereinbefore provided or, otherwise, as directed by the Secretary of the Interior, shall appraise any lands applied for under these regulations within nine months from the date of such application, the applicant may, without notice, within thirty days thereafter, deposit the amount, not less than \$2.50 per acre, specified in his application as the reasonable value of the land and the timber thereon, with the receiver, and thereupon will be allowed to proceed with his application to purchase as though the appraisement had been regularly made. The failure of the applicant to make the required deposit within thirty days after the expiration of the nine months' appraisement period will terminate his rights without notice.

NOTICE OF APPRAISEMENT: PAYMENT OR PROTEST.

20. The register and receiver, after noting the appraised price on their records, will immediately inform the applicant that he must, within thirty days from the date thereof, deposit with the receiver, either in lawful money or in post-office money orders payable to the receiver, or as provided in section 36 hereof, the appraised price of the land and the timber thereon, or within the time allowed for payment file his protest against the appraisement, deposit with the receiver a sum sufficient to defray the expenses of a reappraisement (which sum, not less than \$100, must be fixed by the register and

receiver and specified in the notice to the applicant), together with his application for reappraisalment at his own expense. (See Form D, Appendix.)

OBJECTION TO APPRAISEMENT: APPLICATION FOR REAPPRAISEMENT.

21. Any applicant filing his protest against an appraisalment, and his application for reappraisalment, must support it by his affidavit, corroborated by two competent, credible, and disinterested persons, in which he must set forth specifically his objections to the appraisalment. He must indicate his consent that the amount deposited by him for the reappraisalment, or such part thereof as is necessary, may be expended therefor, without any claim on his part for a refund or return of the money thus expended.

REAPPRAISEMENT.

22. *Upon the receipt of a protest against appraisalment and application for reappraisalment conforming to the regulations herein, the register and receiver will transmit such protest and application to the chief of field division, who will cause the reappraisalment to be made by some officer other than the one making the original appraisalment. The procedure provided herein for appraisalment will be followed for reappraisalment, except the latter, if differing from the former, must, to give it effect, be approved both by the chief of field division and the register and receiver, or, in case of disagreement between them, by the Commissioner of the General Land Office. (Form E, Appendix.)*

NOTICE OF APPRAISEMENT.

23. When a reappraisalment is finally effected, the register and receiver will note the reappraised price on their records, and at once notify the applicant that he must, within thirty days from the date of notice, deposit with the receiver the amount fixed by such reappraisalment for the sale of the land, or thereafter, and without notice, forfeit all rights under his application. (Form F, Appendix.)

COST OF MAKING REAPPRAISEMENT.

24. The officer or employee of the United States making the reappraisalment shall be paid from the amount deposited with the receiver by the applicant therefor, the salary, per diem, and other expenses to which he would have been entitled from the Government, in the case of an original appraisalment, for his services for the time he was engaged in making and returning the reappraisalment. The receiver will, out of the money deposited by the applicant, pay

such compensation including reasonable expenses for subsistence, transportation, and necessary assistants; and the officer will deduct from his expense account with the Government the amount which he has received from the receiver for such services. The receiver will return to the applicant the amount, if any, remaining on deposit with him after paying the expenses of said reappraisement.

FINAL PROOF.

25. After the appraisement or reappraisement and deposit of purchase money and fee have been made the register will fix a time and place for the offering of final proof, and name the officer before whom it shall be offered and post a notice thereof in the land office and deliver a copy of the notice to the applicant, to be by him and at his expense published in the newspaper of accredited standing and general circulation published nearest the land applied for. This notice must be continuously published in the paper for sixty days prior to the date named therein as the day upon which final proof must be offered. (Form "G," appendix.)

TIME, PLACE, AND METHOD OF MAKING FINAL PROOF.

26. Final proof should be made at the time and place mentioned in the notice, and, as a part thereof, evidence of publication, as required by the previous paragraph, should also be filed. If final proof is not made on that day or within ten days thereafter, the applicant may lose his right to complete entry of the land. Upon satisfactory showing, however, explaining the cause of his failure to make the proof as above required, and in the absence of adverse claim, the Commissioner of the General Land Office may authorize him to readvertise and complete entry under his previous application. (See Form "H," Appendix.)

FINAL ENTRY.

27. After an appraisement or reappraisement has been approved, the payments made, and satisfactory proof submitted in any case as required by these regulations, the register and receiver will, if no protest or contest is pending, allow a final entry.

GENERAL PROVISIONS.

CONTESTS AND PROTESTS.

28. Protest may be filed at any time before an entry is allowed, and contest may be filed at any time before patent issues, by any person who will furnish the register and receiver with a corroborated affidavit alleging facts sufficient to cause the cancellation of the entry, and will pay the cost of contest.

FALSE SWEARING—FORFEITURE.

29. *If an applicant swear falsely in his application or sworn statement, he will be liable to indictment and punishment for perjury; and if he be guilty of false swearing or attempted fraud in connection with his efforts to obtain title, or if he fail to perform any act or make any payment or proof in the manner and within the time specified in the foregoing regulations, his application and entry will be disallowed and all moneys paid by him will be forfeited to the Government, and his rights under the timber and stone acts will be exhausted.*

EFFECT OF APPLICATION TO PURCHASE.

30. *After an application has been presented hereunder no other person will be permitted to file on the land embraced therein under any public-land law until such application shall have been finally disposed of adverse to the applicant.*

31. *Lands appraised or reappraised hereunder, but not sold, may, upon the final disallowance of the application, be entered by any qualified person, under the provisions of the timber and stone laws, at its appraised or reappraised value, if subject thereto.*

32. *Lands applied for but not appraised and not entered under these regulations may, when the rights of the applicant are finally terminated, be disposed of as though such application had not been filed.*

33. *Any lands which have not been reappraised may be reappraised upon the request of an applicant therefor under these regulations who complies with the requirements of section 21 hereof.*

34. *An applicant securing a reappraisement under these Regulations shall acquire thereby no right or privilege except that of purchasing the lands at their reappraised value, if he is qualified, and if the lands are subject to sale under his application; and he must otherwise comply with these Regulations, but shall not, in any event, be entitled to the return of any money deposited by him and expended in such reappraisement.*

35. *The Commissioner of the General Land Office may at any time direct the reappraisement of any tract or tracts of public lands, when, in his opinion, the conditions warrant such action.*

36. *Unsatisfied military bounty land warrants under any act of Congress and unsatisfied indemnity certificates of location under the act of Congress approved June 2, 1858, properly assigned to the applicant, shall be receivable as cash in payment or part payment for lands purchased hereunder at the rate of \$1.25 per acre.*

37. *Any application to purchase timber and stone lands filed before January 1, 1909, which does not conform to these regulations shall be suspended, and the register and receiver should at once notify the*

applicant that he may, if he so elect, file a new application conformable to these regulations within thirty days from the date of the notice, and that failure to file such new application within the time specified will work a forfeiture of all rights under his suspended application, which will thereupon stand rejected without further notice.

38. These regulations shall be effective on and after December 1, 1908, but all applications to purchase legally pending on November 30, 1908, may be completed by compliance with the regulations in force at the time such applications were filed.

39. The forms mentioned herein and included in the appendix hereto shall be a part of these regulations.

ENTRY OF STONE LANDS.

40. The foregoing regulations apply to entries of lands chiefly valuable for stone, and the forms herein prescribed can be modified in such manner as may be necessary to the making of entries of stone lands.

FORMER REGULATIONS REVOKED.

41. All former regulations, decisions, and practices in conflict with these regulations are hereby revoked.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,
Secretary.

DECISIONS RELATING TO THE PUBLIC LANDS.

APPENDIX.

REGULATIONS APPROVED NOVEMBER 30, 1908.

ACTS RELATING TO TIMBER AND STONE ENTRIES.

AN ACT For the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the

receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

* * * * *

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved, June 3, 1878. (20 Stat., 89.)

AN ACT To authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the State of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

Approved, August 4, 1892. (27 Stat., 348.)

AN ACT To provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty- [seventy-] seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved, December 13, 1894. (28 Stat., 594.)

AN ACT To abolish the distinction between offered and unoffered lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in cases arising from and after the passage of this act the distinction now obtaining in the statutes between offered and unoffered lands shall no longer be made in passing upon subsisting preemption claims, in disposing of the public lands under the homestead laws, and under the timber and stone law of June third, eighteen hundred and seventy-eight, as extended by the act of August fourth, eighteen hundred and ninety-two, but in all such cases hereafter arising the land in question shall be treated as unoffered, without regard to whether it may have actually been at some time offered or not.

* * * * *

Approved, May 18, 1898. (30 Stat., 418.)

AN ACT To amend the Act of Congress of March eleventh, nineteen hundred and two, relating to homesteads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act to amend section twenty-two hundred and ninety-four of the Revised Statutes of the United States," approved March eleventh, nineteen hundred and two, be, and the same is hereby, amended to read as follows:

"That section twenty-two hundred and ninety-four of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is

located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

“For each affidavit, twenty-five cents.

“For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

“For each deposition of claimant or witness, prepared by the officer, one dollar.

“Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars.”

Approved, March 4, 1904. (33 Stat., 59.)

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act; *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890.. (26 Stat., 391.)

AN ACT To repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of “An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and

eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs; and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands, and not include lands entered or sought to be entered under mineral-land laws.

Approved, March 3, 1891. (26 Stat., 1095.)

The 320-acre limitation provided by the above acts of August 30, 1890 (26 Stat., 391), and March 3, 1891 (26 Stat., 1095), applies to timber and stone entries. (33 L. D., 539, 605.)

[Form A.]

APPLICATION AND SWORN STATEMENT.

[To be made in duplicate.]

ACT JUNE 3, 1878, AND ACTS AMENDATORY.

DEPARTMENTAL REGULATIONS APPROVED NOVEMBER 30, 1908.

UNITED STATES LAND OFFICE,
—, 1908.

I, —, hereby make application to purchase the — quarter of section —, in township — and range —, in the State of —, and the timber thereon, at such value as may be fixed by appraisalment, made under the authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "Timber and stone law," and acts amendatory thereof, and in support of this application I solemnly swear: That I am a native (or naturalized) citizen of the United States (or have declared my intention to become a citizen); that I am — years of age and by occupation —; that I did on —, 19—, examine said land, and from my personal knowledge state that said land is unfit for cultivation and is valuable chiefly for its timber, and that to my best knowledge and belief, based upon said examination, the land is worth — dollars, and the timber thereon, which I estimate to be — feet, board measure, is worth — dollars, making a total value for the land and timber of — dollars and no more; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper or coal, or other minerals, salt springs or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any

of the nonmineral public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post-office address is _____, at which place any notice affecting my rights under this application may be sent. I request that notice be furnished me for publication in the _____ newspaper, published at _____.

(Sign here, with full Christian name.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known, or has been satisfactorily identified before me by _____ (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office in _____ (town), _____ (county and State), within the _____ land district this _____ day of _____, 19—.

(Official designation of officer.)

In case the applicant has been naturalized or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

If the residence is in a city, the street and number must be given.

The newspaper designated must be one of general circulation, published nearest the land.

[Form B.]

DESIGNATION OF APPRAISER.

DEPARTMENTAL REGULATIONS APPROVED NOVEMBER 30, 1908.

_____,
_____, 19—.

SIR: You are designated to appraise the _____ quarter of section _____, township _____, _____, and range _____, _____, which embraces a total of _____ acres. This land has been applied for by _____, of _____, _____, under the timber and stone law. If you accept this designation, it will be your duty to personally visit and carefully examine each and every legal subdivision of the land, and the timber thereon, and to make a return through this office of the approximate quantity, quality, and the stumpage cash value of the various kinds of timber, the cash value of the land, and the total value of the land and timber. The total appraisement of the land and timber, however, must not amount to less than two dollars and fifty cents per acre for each acre appraised. Each legal subdivision must be separately appraised, or your return must show specifically that the appraisement applies to each legal subdivision.

Please inform me as soon as possible, and not later than _____, 19—, whether you will be able to do the work, and also advise me the approximate date the appraisal will be completed.

Very respectfully,

_____,
Chief of Field Division, General Land Office.

[Form C.]

APPRAISAL, TIMBER AND STONE LANDS.

ACT MARCH 3, 1878, AND ACTS AMENDATORY.

DEPARTMENTAL REGULATIONS APPROVED NOVEMBER 30, 1908.

Lot or quarter-quarter.	Kind of timber.	Quality of timber.	Board feet per tract.	Stumpage value per M.	Character of soil.	Value of land exclusive of timber.	Total value of land and timber per acre.	Value of land and timber per tract.

Logging:

Timber must be logged by —— (wagon haul, flume, river driving, or railroad).

Distance logs or lumber are to be transported to market, —— miles. Approximate cost per M for transportation of logs or lumber to market, —— dollars. Accessible? —— (yes or no). Manufacturing possible on the ground? —— (yes or no). Will there be improvement in logging facilities in the vicinity? —— (yes or no). Will the demand for timber products be likely to increase in the neighborhood in the near future? —— (yes or no). Nearest available quotations on stumpage for the species estimated ——.

—— —, 19—.

STATEMENT BY APPRAISER.

I have carefully examined each and every legal subdivision of the —— quarter of section ——, township ——, range ——, and the timber thereon, and the estimates included in the above table and the foregoing statement were based on personal examination. I did not find any indication that the land or any part thereof contains any valuable mineral or coal deposits, and found no improvements or other evidence that any claim is being asserted under any of the public-land laws. I recommend that the application to purchase receive favorable action.

_____,
Appraiser.

ACTION ON APPRAISEMENT.

I have carefully examined the within appraisement and find no reason to believe that it is improperly made.

It is therefore, accordingly, APPROVED.

_____,
Chief of Field Division.

NOTE.—The approval of the appraisal by the chief of field division is final, and no action is required thereon by the register and receiver, except to note the appraised price on their records, and to issue the necessary notices. The register and receiver

will, in the event of a disagreement between the appraiser and the chief of field division, and their concurrence with the appraiser, sign the following certificate:

UNITED STATES LAND OFFICE, _____,
_____, _____.

We have carefully considered the within appraisal and the objections thereto urged by the chief of field division, and, believing that the appraisal is not materially high or low, the same is hereby approved.

_____, *Register.*
_____, *Receiver.*

NOTE.—If the register and receiver concur in the adverse objections of the chief of field division they will proceed in accordance with paragraph 17 of the Regulations approved November 30, 1908.

SUGGESTIONS TO APPRAISER.

The appraiser should fill in each blank carefully and legibly. Under the head of kinds of timber he should state the species, such as "yellow pine," "white pine," "Douglas fir," "spruce," etc. If there are more than four leading species, all others should be under the head of "Miscellaneous," in the fifth space. The quality of the timber should be judged as far as possible at local sawmills, and should be indicated by such descriptive words as "excellent," "good," "fair," and "poor."

In the first column to the left the description of the land should be given.

[Form D.]

NOTICE TO APPLICANT OF APPRAISEMENT.

DEPARTMENTAL REGULATIONS APPROVED NOVEMBER 30, 1908.

UNITED STATES LAND OFFICE,
_____, _____.

SIR: You are informed that the land, and the timber thereon, embraced in your timber and stone application No. _____, filed _____, 19—, have been appraised in the total sum of _____ dollars.

You are therefore notified that your application for said lands will be dismissed without further notice, if you do not, within thirty days after date of this notice, deposit the appraised price of the land with the receiver of this office, or file your written protest against such appraisal, setting forth clearly and specifically your objection thereto, which protest must be sworn to by you, and corroborated by two competent, credible, and disinterested persons. The protest, if filed, must be accompanied by your application requesting that the land be reappraised at your expense, and you must deposit with the receiver the sum of _____ dollars, to be expended therefor, and you must indicate your consent that the amount so deposited may be expended for the reappraisal, without any claim on your part that any portion thereof, so expended, shall be returned or refunded to you.

If a reappraisement is made under your application, you will secure no right or privilege, except that of purchasing the lands at their reappraised value, if they are subject to sale and you are properly qualified.

Very respectfully,

_____, *Register.*
_____, *Receiver.*

[Form E.]

REAPPRAISEMENT.

Form C may be modified so as to show that the action taken is a reappraisement instead of an original appraisal. The return of the appraising officer and indorsements by the chief of field division and the register and receiver must show that the action taken is a reappraisement, and it must be approved conjointly by the chief of field division and the register and receiver.

[Form F.]

NOTICE OF REAPPRAISEMENT.

DEPARTMENTAL REGULATIONS APPROVED NOVEMBER 30, 1908.

UNITED STATES LAND OFFICE,

Sir: You are advised that, pursuant to your application, the _____ quarter of section _____, township _____, and range _____, and the timber thereon, embraced in your timber and stone sworn statement, No. —, have been reappraised, and the price fixed at _____ dollars, which amount you must deposit with the receiver of this office within thirty days from date of notice hereof, or your application will be finally disallowed without further notice.

Very respectfully,

_____, *Register.*
_____, *Receiver.*

[Form G.]

NOTICE OF APPLICATION TO PURCHASE UNDER TIMBER AND STONE LAWS.

DEPARTMENTAL REGULATIONS APPROVED NOVEMBER 30, 1908.

UNITED STATES LAND OFFICE,

Notice is hereby given that _____, whose post-office address is _____, 19—, did on the _____ day of _____, 19—, file in this office his sworn statement and application No. — to purchase the _____ quarter of section _____, township _____, range _____, _____ M., and the timber thereon, under the provisions of the act of June 3, 1878, and acts amendatory, known as the "Timber and stone law," at such value as might be fixed by appraisal, and that, pursuant to such application, the land and timber thereon have been appraised, the timber estimated _____ board feet, at \$_____ per M, and the land \$_____, or combined value of the land and timber at \$_____;

that said applicant will offer final proof in support of his application and sworn statement on the _____ day of _____, 19____, before _____, at _____. Any person is at liberty to protest this purchase before entry, or initiate a contest at any time before patent issues, by filing a corroborated affidavit in this office, alleging facts which would defeat the entry.

_____, Register.

Where notice is issued under section 19, the register will modify the blank so as to show the valuation placed on the land and the timber thereon was that made by the applicant when he filed his sworn statement, instead of being fixed by appraisalment.

[Form H.]

TIMBER OR STONE ENTRY.

(4—370a.)

(Departmental regulations approved by the Secretary of the Interior November 30, 1908.)

DEPARTMENT OF THE INTERIOR.

U. S. LAND OFFICE, _____, _____, No. _____.

Receipt No. _____.

FINAL PROOF.

I hereby solemnly swear that I am the identical _____, who presented sworn statement and application, No. _____, for _____, section _____, township _____, range _____, _____ meridian; that the land is valuable chiefly for its timber, and is, in its present condition, unfit for cultivation; that it is unoccupied and without improvements of any character, except for ditch or canal purposes, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, coal, salines, or salt springs.

_____,
(Sign here, with full Christian name.)

_____,
(Post-office address.)

'I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____; that I verily believe affiant
(Give full name and post-office address.)

to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in _____, _____, within the _____ land district, this _____ day of _____, 19____.
(County and State.)

_____,
(Official designation of officer.)

This form of proof can be accepted only where the land embraced in the application to purchase has been appraised or reappraised pursuant to the provisions of the Timber and Stone Regulations approved November 30, 1908; by the Secretary of the Interior.

Proof supporting applications to purchase under section 19 of the said regulations or under applications pending November 30, 1908, must be made by the applicant and two witnesses, as required by the regulations in force prior to December 1, 1908. (See Forms 4—370 and 4—371.)

[To be used only when sale is made under section 19 of the regulations approved November 30, 1908, and in sales under applications pending November 30, 1908.]

4-370.

(Form approved by the Secretary of the Interior November 12, 1907.)

DEPARTMENT OF THE INTERIOR.

TIMBER OR STONE ENTRY.

U. S. LAND OFFICE, ———, ———, ———.

TESTIMONY OF CLAIMANT.

I, ——— (give full Christian name), being duly called as a witness in support of my application to purchase the ———, section ———, township ———, range ———, ——— meridian, testify as follows:

Question 1. What is your age, occupation, post-office address, and where do you live?

Answer.

Question 2. Are you a native-born citizen of the United States; and, if so, in what State or Territory were you born? Are you married or single?

Answer.

Question 3. Are you the identical person who applied to purchase this land on the ——— day of ———, 19—, and made the sworn statement required by law upon that day?

Answer.

Question 4. Have you made a personal examination of each smallest legal subdivision of the land applied for?

Answer.

Question 5. When, under what circumstances, and with whom was such examination made?

Answer.

Question 6. How did you identify said land? Describe it fully.

Answer.

Question 7. Is the land occupied, or are there any improvements on it? If so, describe them and state whether they belong to you.

Answer.

Question 8. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Answer.

Question 9. What is the situation of this land, what is the nature of the soil, and what causes render the same unfit for cultivation?

Answer.

Question 10. Are there any salines or indications of deposits of gold, silver, cinnabar, copper, coal, or other minerals on this land? If so, state what they are.

Answer.

Question 11. Is the land valuable for mineral, or more valuable for any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone? (Answer each question.)

Answer.

Question 12. From what facts do you conclude that the land is chiefly valuable for timber and stone?

Answer.

Question 13. How many thousand feet, board measure, of lumber do you estimate that there is on this entire tract? What is the stumpage value of same?

Answer.

Question 14. Are you a practical lumberman or woodsman? If not, how do you arrive at your estimate of the quantity and value of lumber on the tract?

Answer.

Question 15. What do you expect to do with this land and the timber when you get title to it?

Answer.

Question 16. Do you know of any capitalist or company which has offered to purchase timber land in the vicinity of this entry? If so, who are they, and how do you know of them?

Answer.

Question 17. Has any person offered to purchase this land if you acquire title? If so, who, and for what amount?

Answer.

Question 18. Where is the nearest and best market for the timber on this land at the present time?

Answer.

Question 19. What has been your occupation during the past year; where and by whom have you been employed, and at what compensation?

Answer.

Question 20. How did you first learn about this particular tract of land, and that it would be a good investment to buy it?

Answer.

Question 21. Did you pay or agree to pay anything for this information? If so, to whom, and the amount?

Answer.

Question 22. Did you pay out of your own individual funds all the expenses in connection with making this filing, and do you expect to pay for the land with your own money?

Answer.

Question 23. Where did you get the money with which to pay for this land, and how long have you had same in your actual possession?

Answer.

Question 24. Have you kept a bank account during the past six months? If so, where?

Answer.

Question 25. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except yourself?

Answer.

Question 26. Do you make this entry in good faith for the appropriation of the land and the timber thereon exclusively for your own use and not for the use or benefit of any other person?

Answer.

Question 27. Has any person other than yourself, or any firm, corporation, or association any interest in the entry you are now making, or in the land or in the timber thereon?

Answer.

* Question 28. Have you since August 30, 1890, entered and acquired title to, or are you now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres?

Answer.

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above deposition will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.) In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

* NOTE.—In addition to the foregoing testimony the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

I hereby certify that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent is to me personally known [or has been satisfactorily identified before me by _____ (give full name and post-office address)]; that I verily believe deponent to be a qualified claimant and the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me, at my office, in _____ (town), _____ (county and State), within the _____ land district, this _____ day of _____, 19—.

I further certify that I tested the accuracy of affiant's information and good faith in making the entry, by close and sufficient cross-examination of claimant and the witnesses, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest of, nor for the benefit of, any other person or persons, firm, or corporation.

.....
(Official designation of officer.)

REVISED STATUTES OF THE UNITED STATES. TITLE LXX.—CRIMES.—CHAP. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or willfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

4-371

(Form approved by the Secretary of the Interior November 12, 1907.)

DEPARTMENT OF THE INTERIOR.

TIMBER OR STONE ENTRY.

U. S. LAND OFFICE, _____, _____.

TESTIMONY OF WITNESS.

I, _____ (give full Christian name), being duly called as a witness in support of the application of _____, _____ (give full Christian name), filed at the _____ land office, to purchase the _____ section _____, township _____, range _____, _____ meridian, testify as follows:

Question 1. What is your age, occupation, post-office address, and where do you live?

Answer.

Question 2. By whom have you been employed during the last six months?

Answer.

Question 3. Are you acquainted with the land above described by a personal examination of each of its smallest legal subdivisions? Describe the tract fully.

Answer.

Question 4. When, with whom, and in what manner was such examination made?

Answer.

Question 5. Is it occupied or are there any improvements on it not made for ditch or canal purposes, or which were not made by, or do not belong to, the said applicant?

Answer.

Question 6. Is it fit for cultivation?

Answer.

Question 7. What causes render it unfit for cultivation?

Answer.

Question 8. Are there any salines or indications of deposits of gold, silver, cinnabar, copper, coal, or other minerals on this land? If so, state what they are.

Answer.

Question 9. Is the land valuable for mineral, or more valuable for any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone? (Answer each question.)

Answer.

Question 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Answer.

Question 11. How long have you known the applicant?

Answer.

Question 12. What is his financial condition so far as you know?

Answer.

Question 13. Do you know of your own knowledge that applicant has sufficient money of his own to pay for this land and hold it six months without mortgaging it?

Answer.

Question 14. Do you know whether the applicant has, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever by which the title he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself?

Answer.

*Question 15. Are you in any way interested in this application or in the land above described, or the timber or stone, salines, mines, or improvements of any description thereon?

Answer.

(Sign here, with full Christian name:)

NOTE.—Every person swearing falsely to the above deposition will be punished as provided by law for such offense. (See Sec. 5392 R. S., below.)

*NOTE.—In addition to the foregoing testimony, the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

I hereby certify that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent is to me personally known [or has been satisfactorily identified before me by ———— (give full name and post-office address)]; that I verily believe deponent to be a credible witness and the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me, at my office, in ———— (town), ———— (county and State), within the ———— land district, this ———— day of ————, 19—.

(Official designation of officer.)

REVISED STATUTES OF THE UNITED STATES. TITLE LXX.—CRIMES.—CHAP. 4.

SEC. 5392.—Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

NOTE.—In addition to the above penalty, every person who knowingly or wilfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment.

STATUTES AND REGULATIONS GOVERNING ENTRIES AND PROOFS
UNDER THE DESERT-LAND LAWS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 30, 1908.

1. The laws under which desert-land entries may be made are found in the acts of March 3, 1877 (19 Stats., 377); March 3, 1891 (26 Stats., 1095); March 26, 1908 (Public No. 67); and March 28, 1908 (Public No. 75), complete copies of which will be found at the end of this circular.

DEFINITION OF DESERT LANDS.

2. Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands. Lands which will produce an agricultural crop of any kind in amount to make the cultivation reasonably remunerative are not desert. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

While lands which border upon streams, lakes, and other bodies of water, or through or upon which there is any stream, body of water, or living spring, may not produce agricultural crops without irrigation, such lands are not subject to entry under the desert-land laws until the clearest proof of their desert character is furnished.

STATES IN WHICH DESERT-LAND ENTRIES MAY BE MADE.

3. Desert-land entries may be made only in the States of California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico.

WHO MAY MAKE A DESERT-LAND ENTRY.

4. Any citizen of the United States, twenty-one years of age, or any person of that age who has declared his intention of becoming a citizen of the United States, and who can make the affidavit specified in paragraph 9 of these regulations, can make a desert-land entry. Thus a woman, whether married or single, who possesses the necessary qualifications, can make a desert-land entry.

At the time of making final proof, however, entrymen of alien birth must have been admitted to full citizenship, which must be shown by a duly certified copy of the certificate of naturalization.

QUANTITY OF LAND THAT MAY BE ACQUIRED.

5. Under the original act of March 3, 1877, a person was allowed to enter one section, or 640 acres, of desert land, but, by the act of March 3, 1891, no person is allowed to enter more than 320 acres of desert land. Moreover, by the act of August 30, 1890 (26 Stats., 391), no person is permitted to acquire title, under all the agricultural land laws, to more than 320 acres; therefore, if a person has, since August 30, 1890, acquired, under any of the laws except the mineral laws, 320 acres, or is at the date of his application claiming 320 acres under said laws, he is not authorized to make a desert-land entry for any quantity whatever.

A person may make only one entry under the desert-land law, and the right is exhausted by that entry, whether the maximum quantity of land, or less, is entered, except, however, that under the act of March 26, 1908, if a person, prior to the passage of that act, has made an entry and has abandoned, lost, or forfeited the same, or has relinquished without receiving a valuable consideration therefor, such person may make a second entry. In such cases, however, it must be shown that the former entry was not assigned in whole or in part or canceled for fraud, and it must be so described by section, township, and range, or by date and number, as to be readily identified on the records of the General Land Office. In such cases it is not sufficient for the applicant to state that he made an entry at a certain land office, about a certain time; but the land must be sufficiently described, or the date and number of the entry stated.

LAND MUST BE IN COMPACT FORM.

6. Land entered under these laws should be in compact form; which means that it should be as nearly a square form as possible. Where, however, it is impracticable, on account of the previous appropriation of adjoining lands, or on account of the topography of the country, to take the land in a compact form, all the facts regarding the situation, location, and character of the land sought to be entered, and the surrounding tracts, should be stated, in order that the General Land Office may determine whether, under all the circumstances, the entry should be allowed in the form sought. Entry-men should make a complete showing in this regard, and should state the facts, and not the conclusions they derive from the facts, as it is the province of the Land Department of the Government to determine whether or not, from the facts stated, the entry should be allowed.

HOW PREFERENCE RIGHT MAY BE ACQUIRED ON UNSURVEYED LAND.

7. Prior to the act of March 28, 1908, a desert-land entry could embrace unsurveyed lands, but, since the date of that act, desert-land

entries may not be made of unsurveyed lands. This act provides, however, that if a duly qualified person shall go upon a tract of unsurveyed desert land and reclaim, or commence to reclaim, the same he shall be allowed a preference right of ninety days after the filing of the plat of survey in the local land office to make entry of the land. To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed.

HOW TO PROCEED TO MAKE A DESERT-LAND ENTRY.

8. A person who desires to make entry under the desert-land laws, must file with the register and receiver of the proper land office a declaration or application, under oath, showing that he is a citizen of the United States, or has declared his intention to become a citizen; that he is 21 years of age or over; and that he is also a bona fide resident of the State or Territory in which the land sought to be entered is located. He must also state that he has not previously exercised the right of entry under the desert-land laws by making an entry or by having taken one by assignment; that he has not, since August 30, 1890, acquired title to, nor is claiming under any of the agricultural-land laws, including the lands applied for, lands which in the aggregate exceed 320 acres; and that he intends to reclaim the lands applied for, by conducting water thereon, within four years from the date of his application. This declaration must contain a description of the land, by legal subdivisions, section, township, and range.

9. Special attention is called to the terms of this application, as they require a personal knowledge by the entryman of the lands intended to be entered. The affidavit, which is made a part of the application, may not be made by an agent or upon information and belief, and the register and receiver must reject all applications in which it is not made to appear that the statements contained therein are made upon the applicant's own knowledge and that it was obtained from a personal examination of the lands. The blank spaces in the application must be filled with a complete statement of the facts showing the applicant's acquaintance with the land and how he knows it to be desert land. This declaration must be corroborated by the affidavits of two reputable witnesses, who also must be personally acquainted with the land, and they must state the facts regarding the condition and situation of the land upon which they base the opinion that it is subject to desert entry.

10. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their post-office addresses. It is not sufficient to name only the county or State in

which a person lives, but the town or city must be named also, and where the residence is in a city the street and number must be given. The register and receiver will be careful to note the post-office address on their records.

11. The application and corroborating affidavits must be sworn to before the register or receiver of the land district in which the land is located, or before a United States commissioner or commissioner of a court exercising federal jurisdiction in the Territory, or before the judge or clerk of any court of record in the county or land district in which the land is situated. In case the application and affidavits are made out of the county in which the land is located, the applicant must show, by affidavit, that the application was made before the nearest or most accessible officer qualified to take such affidavits in the land district; see the act of March 4, 1904 (33 Stats., 59, and 32 L. D., 539). The affidavits of the applicant and his two witnesses must in every instance be made at the same time and place and before the same officer.

12. Persons who make desert-land entries must acquire a clear right to the use of sufficient water to irrigate and reclaim the whole of the land entered, or as much of it as is susceptible of irrigation, and of keeping it permanently irrigated. Therefore, if a person makes an entry before he has acquired a water right, he does so at his own risk, because one entry will exhaust his right, and he will not be repaid the money paid at the time of making the entry.

13. At the time of filing his application with the register and receiver the applicant should also file a map showing the plan by which he proposes to conduct water upon the land and the manner by which he intends to irrigate the same, and at the same time he must pay the receiver the sum of 25 cents per acre for the land applied for. The receiver will issue a receipt for the money, and the register and receiver will jointly issue a certificate showing the allowance of the entry. This application will be given its proper serial number, and at the end of each month an abstract of the entries allowed under these laws will be transmitted to the General Land Office.

ASSIGNMENTS.

14. Under the act of March 3, 1891, the whole of a desert-land entry might be assigned by the entryman, and by the act of March 28, 1908, an entry may be assigned either in whole or in part; but this does not mean that less than a legal subdivision may be assigned. Therefore, where an entry embraces only one lot or one 40-acre tract, the whole may be assigned, but no assignment of any part less than the whole will be recognized.

15. The act of March 28, 1908, also provides that no person may take a desert entry by assignment unless he is qualified to enter the

tract so assigned to him. Therefore, if a person has made an entry in his own right, he can not thereafter take an entry by assignment, notwithstanding the fact that the area of the two entries combined may not exceed 320 acres.

The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment. The desert-land right is exhausted either by making an entry or by taking one by assignment.

However, under the practice recognized by the General Land Office, where assignments were taken of more than one entry or where a person made an entry and also took one or more entries by assignment, the aggregate area of the land embraced in all such entries not exceeding 320 acres, such assignments and entries will not be disturbed. But all assignments and entries made subsequent to the approval of the act of March 28, 1908, must be governed by the terms of that act, which is held to mean that the desert-land right is exhausted either by making an entry or by taking one by assignment.

The act of March 28, 1908, forbids the assignment of an entry to a corporation or an association.

16. As stated above, desert-land entries may be assigned in whole or in part, and as evidence of the assignment there should be transmitted to the General Land Office the original deed of assignment or a certified copy thereof. Where the deed of assignment is recorded, a certified copy may be made by the officer who has custody of the record. Where the original deed is presented to an officer qualified to take proof in desert-land cases, a copy certified by such officer will be accepted. Attention is called to the fact that copies of deeds of assignment certified by notaries public or justices of the peace, or, indeed, any other officers than those who are qualified to take proofs and affidavits in desert-land cases, will not be accepted.

An assignee must file, with his deed of assignment, an affidavit showing qualifications to take the entry assigned to him. He must show what entries have been made by or assigned to him under the agricultural laws, and he must also show his qualifications as a citizen of the United States, that he is 21 years of age or over, and also that he is a resident citizen of the State or Territory in which the land assigned to him is situated. In short, the assignee must possess the qualifications required of the party making an entry. No assignable interest is acquired by the applicant prior to the payment of 25 cents an acre. (33 L. D., 152.) An assignment made prior to or on the day of such payment is treated as evidence of fraud. (2 L. D., 22.) The sale of the land embraced in an entry at any time before final payment is made must be regarded as an assignment of the entry, and in such cases the person buying the land must show

that he possesses all the qualifications required of an assignee. (29 L. D., 453.)

ANNUAL PROOFS.

17. During the first, second, and third years after making entry the entryman must expend one dollar each year for each acre of land entered by him for the purpose of improving and reclaiming the land, and at or before the end of each year he must make and file with the register and receiver proof of such expenditure. With the third year's proof there should also be filed a map or plan showing the improvements made upon the land. This proof, which is known as yearly or annual proof, may be made before any officer who is qualified to take the affidavits required at the time of making the application. This proof must be made by the applicant, whose affidavit must be corroborated by that of two reputable witnesses, all of whom must have personal knowledge that the expenditures were made for the purpose stated in the proof.

This proof must be made in the county or land district in which the land is located, and when it is made outside of the county in which the land is situated, claimant must show by his affidavit that it was made before the nearest or most accessible officer qualified to take such proof.

18. In making annual proof, expenditures for ditches, canals, dams, fences, roads, where they are necessary, the first breaking of the soil, for erecting barns, stables, etc., and for digging wells, where they are to be used in irrigating the lands, will be accepted as satisfactory expenditures; but expenditures for surveying the land in order to locate the corners of the same will not be accepted. However, where such surveying is for the purpose of ascertaining the levels of ditches, canals, etc., it may be accepted. Expenditures for cultivation after the soil has been first prepared will not be allowed, because the entryman is supposed to be repaid for such work by the crops to be reaped as a result of cultivation. Expenditures for material of any kind will not be allowed, unless such material has been actually installed or used for the purpose for which it is purchased. For instance, if credit is asked for posts and wire for fences, it must be shown that the fence has been actually constructed by erecting the posts and stringing the wire on them. Annual proofs must contain itemized statements showing the manner in which expenditures were made.

Expenditures for stock or interest in an irrigating company, through which water is to be secured for irrigating the land, will also be accepted as satisfactory annual expenditures; but in such cases the claimant must furnish a receipt for the money paid for the stock, or other written evidence of payment for the stock or interest in the irrigating plant. Annual proofs must be forwarded to the

General Land Office at the end of the month during which they are made, after having been properly noted on the records of the local land office.

At the end of each year, if the required proof of actual expenditures has not been made, the register and receiver will send the entryman notice and allow him sixty days in which to submit such proof. If the proof is not furnished as required, the fact that notice was served upon the claimant should be reported to the General Land Office, with evidence of service, whereupon the entry will be canceled. Registers and receivers should keep on hand a sufficient supply of blank forms used in notifying the entrymen that annual proofs are due, and they should send such notices whenever necessary, without waiting further instructions from the General Land Office.

19. Nothing in the statutes or the regulations should be construed to mean that the entryman must wait until the end of the year to submit his annual proof, because the proof may be properly submitted as soon as the expenditures have been made. Proof sufficient for the three years may be offered whenever the amount of \$3 an acre has been expended in reclaiming and improving the land, and thereafter annual proof will not be required.

FINAL PROOF.

20. The entryman, or his assignee, if the entry has been assigned, is ordinarily allowed four years from the date of the entry in which to complete the reclamation of the land, and he is entitled to make final proof and receive patent as soon as he has expended the sum of \$3 an acre in improving and reclaiming the land, and has reclaimed all of the irrigable land embraced in his entry, and has actually cultivated one-eighth of the entire area of the land entered. When an entryman has reclaimed the land and is ready to make final proof he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land and must describe the entry by giving the number thereof and the name of the entryman. If the proof is made by an assignee, his name as well as that of the original entryman should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making the proof.

21. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the land, and it must also be posted in a conspicuous place in the local land office for the same period of time. The date fixed for the taking of the proof must be at least thirty days after the date of first publication. Proof of publication must

be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

22. At the time and place mentioned in the notice, and before the officer named therein, the claimant will appear with two of the witnesses named in the notice, and make proof of the reclamation, cultivation, and improvement of the land. This proof may be taken by any officer qualified to take the affidavits taken at the time of making the original entry. All claimants, however, are advised that, wherever possible, they should make proof before the register or receiver, because, by so doing, they may, in many instances, avoid delay caused by the fact that proofs submitted before officers other than the register or receiver are frequently suspended for investigation by a special agent.

The testimony of each claimant should be taken separate and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separate and apart from and not within the hearing of either the applicant or of any of his witnesses, and both the applicant and each of the witnesses should be required to state, in and as a part of the final proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others.

IRRIGATION, CULTIVATION, AND WATER RIGHTS.

23. The final proof must show specifically the source and volume of the water supply, and how it was acquired and how maintained. The number, length, and carrying capacity of all ditches of each of the legal subdivisions must also be shown. The claimant and the witnesses must each state in full all that has been done in the matter of reclamation and improvement of the land, and must answer fully, of their own personal knowledge, all of the questions contained in the final proof blanks. They must state plainly whether, at any time, they saw the land effectually irrigated, and the different dates on which they saw the land irrigated should be specifically stated.

24. All of each legal subdivision must be actually irrigated. Therefore, it is not sufficient to state that water has been conducted upon each legal subdivision. If there are some high points which it is not practicable to irrigate, the nature, extent, location, and area of such points should be fully stated. If no part of a legal subdivision is susceptible of irrigation, such legal subdivision must be relinquished. (20 L. D., 449.)

25. As a rule, actual tillage of one-eighth of the land must be shown. It is not sufficient to show only that there has been a marked increase in the growth of grass, or that grass sufficient to support stock has

been produced on the land. If, however, on account of some peculiar climatic or soil conditions, no crops except grass can be successfully produced, or if actual tillage will destroy or injure the productive quality of the soil, the actual production of a crop of hay of merchantable value will be accepted as sufficient compliance with the requirements as to cultivation. (32 L. D., 456.) In such cases, however, the facts must be stated, and the extent and value of the crop of hay must be shown.

26. The final proof must also show that the claimant has a right, under the laws of the State or Territory in which the land is located, to a sufficient supply of water to successfully irrigate all the irrigable land embraced in his entry. It must clearly appear that the system of ditches to conduct the water to the land and to distribute it over the whole of each legal subdivision is adequate for that purpose. It is not enough to show that the claimant has constructed the ditches and has a right to a supply of water, but the proof must also show that the water has been actually distributed over the land for such a length of time as to prove the sufficiency of the water supply.

27. In those States where entrymen have made applications for water rights and have been granted permits, but where no final adjudication of the water right can be secured from the State authorities, owing to delay in the adjudication of the water courses, or other delay for which the entrymen are in no way responsible, proof that the entrymen have done all that is required of them by the laws of the State, together with proof that the necessary supply of water has been actually used on the land, may be accepted. (35 L. D., 305.) This modification of the rule that the claimant must furnish evidence of an absolute water right will apply only in those States where, under the local laws, it is absolutely impossible for the entryman to secure final title to his water right within the time allowed him to submit final proof on his entry, and in such cases the best evidence obtainable must be furnished.

28. Where final proof is not made within the period of four years the register and receiver should send the claimant a notice, addressed to him at his post-office address of record, informing him that he will be allowed ninety days in which to submit final proof. Should no action be taken within the time allowed, the register and receiver will report that fact, together with evidence of service, to the General Land Office, whereupon the entry will be canceled.

EXTENSION OF TIME IN SUBMITTING PROOF UNDER CERTAIN CONDITIONS.

29. Under the provisions of the act of March 28, 1908, the period of four years may be extended, in the discretion of the Commissioner of the General Land Office, for an additional period not exceeding three years if, by reason of some unavoidable delay in the construc-

tion of the irrigating works intended to convey water to the land, the entryman is unable to make proof of reclamation and cultivation required within the four years. This does not mean that the period within which proof may be made will be extended as a matter of course. The statute authorizes the Commissioner of the General Land Office to grant the extension in his discretion, and applications for extensions will not be granted unless it be clearly shown that the failure to reclaim and cultivate the land within the regular period of four years was due to no fault on the part of the entryman, but to some unavoidable delay for which he was not responsible and could not have readily foreseen.

An entryman who desires to make application for this extension of time should file with the register and receiver an affidavit setting forth fully all the facts, showing how and why he has been prevented from making final proof of reclamation and cultivation within the regular period. This affidavit should be corroborated by two witnesses who have personal knowledge of the facts, and the register and receiver, after carefully considering all of the facts, will forward the application to the General Land Office, with appropriate recommendation thereon. Inasmuch as registers and receivers reside in their respective districts, they are presumed to have more or less personal knowledge of the conditions existing therein, and for that reason much weight will be given their recommendations.

PAYMENTS—FEES.

30. At the time of making final proof the claimant must pay to the receiver the sum of one dollar per acre for each acre of land upon which proof is made. This, together with the 25 cents per acre paid at the time of making the original entry, will amount to \$1.25 per acre, which is the price to be paid for all lands entered under the desert-land law, regardless of their location. The receiver will issue a receipt for the money paid, and, if the proof is satisfactory, the register will issue a certificate in duplicate and deliver one copy to the entryman and forward the other copy to the General Land Office at the end of the month during which the certificate was issued.

If the entryman is dead and proof is made by any one for the heirs or devisees, the final certificate should issue to the heirs or devisees generally, without naming them.

When final proof is made on an entry made prior to the act of March 28, 1908, for unsurveyed land, if such proof is satisfactory, the register and receiver will approve the same and forward it to the General Land Office, without collecting the final payment of \$1 an acre, and without issuing final certificate. Fees for reducing the final proof testimony to writing should be collected and receipt issued

therefor, if the proof is taken before the register and receiver. As soon as the land is surveyed they will call upon the entryman to make proof in the form of an affidavit, duly corroborated, showing the legal subdivisions covered by his entry. When this has been done the register and receiver will correct their records so as to make them describe the land by legal subdivisions, and, if final proof has been made and found satisfactory, and no other objections exist, final papers should be issued, upon payment of the proper amount.

31. No fees or commissions are required of persons making entry under the desert-land laws, except such fees as are paid to the officers for taking the affidavits and proofs. The only payments made to the Government are the original payment of 25 cents an acre at the time of making the application, and the final payment of \$1 an acre, to be paid at the time of making final proof. Where final proofs are made before the register or receiver in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming; and Montana they will be entitled to receive, jointly, 22½ cents for each 100 words of testimony reduced to writing; in all other States they will be allowed 15 cents per 100 words for such service. United States commissioners, United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final proof witness to final proof testimony which has been reduced to writing by them.

CONTESTS AND RELINQUISHMENTS.

32. Contests may be instituted against desert-land entries for illegality or fraud in the inception of the entry, or for failure to comply with the law after entry, or for any sufficient cause affecting the legality of the claim. An entry made in the interest of, or for the benefit of, another, is illegal, and is subject to contest on that ground. Successful contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, in the same manner as in homestead cases, and the register will give the same notice, and is entitled to the same fee for notice as in other cases.

33. A desert-land entry may be relinquished at any time by the party owning the same, and when relinquishments are filed in the local land office the entries will be canceled by the register and receiver in the same manner as in homestead, preemption, and other cases, under the first section of the act of May 14, 1880 (21 Stats., 140).

DESERT-LAND ENTRIES WITHIN A RECLAMATION PROJECT.

34. By section 5 of the act of June 27, 1906 (34 Stats., 520), it is provided that any desert-land entryman, who has been or may be, directly or indirectly, hindered, delayed, or prevented from making

improvements on or from reclaiming the lands embraced in his entry, by reason of any withdrawal under the reclamation act of June 17, 1902 (32 Stats., 388), will be excused during the continuance of such hindrance from complying with the provisions of the desert-land laws.

This act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by any withdrawal of public lands under the reclamation act, from improving or reclaiming the lands covered by their entries.

35. No entryman will be excused under this act from a compliance with all of the requirements of the desert-land law until he has filed in the local land office for the district in which his lands are situated, an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge.

36. The register and receiver will at once forward the application to the engineer in charge of the reclamation project under which the lands involved are located and request a report and recommendation thereon. Upon the receipt of this report the register and receiver will forward it, together with the applicant's affidavit and their recommendation, to the General Land Office, where it will receive appropriate consideration and be allowed or denied, as the circumstances may justify.

37. Inasmuch as entrymen are allowed one year after entry in which to submit the first annual proof of expenditures for the purpose of improving and reclaiming the land entered by them, the privileges of this act are not necessary in connection with annual proofs until the expiration of the years in which such proofs are due. Therefore, if at the time that annual proof is due it can not be made, on account of hindrance or delay occasioned by a withdrawal of the land for the purpose indicated in the act, the applicant will file his affidavit explaining the delay. As a rule, however, annual proofs may be made, notwithstanding the withdrawal of the land, because expenditures for various kinds of improvements, as indicated herein, are allowed as satisfactory annual proofs. Therefore an extension of time for making annual proof will not be granted unless it is made clearly to appear that the entryman has been delayed or prevented by the withdrawal from making the required improvements; and, unless he has been so hindered or prevented from making the required improvements, no application for extension of time for making final proof will be granted until after all the yearly proofs have been made.

38. An entryman will not need to invoke the privileges of this act in connection with final proof until such final proof is due, and if, at that time, he is unable to make the final proof of reclamation and cultivation, as required by law, and such inability is due, directly or indirectly, to the withdrawal of the land on account of a reclamation project, the affidavit explaining the hindrance and delay should be filed in order that the entryman may be excused for such failure.

39. When the time for submitting final proof has arrived, and the entryman is unable, by reason of the withdrawal of the land, to make such proof, upon proper showing, as indicated herein, he will be excused, and the time during which it is shown that he has been hindered or delayed on account of the withdrawal of the land will not be computed in determining the time within which final proof must be made.

40. If after investigation the irrigation project has been or may be abandoned by the Government, the time for compliance with the law by the entryman will begin to run from the date of notice of such abandonment of the project, and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman must comply with all the provisions of the act of June 17, 1902, and must relinquish all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in said act of June 17, 1902, he shall be entitled to patent.

41. Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman, who owns a water right and reclaims the land embraced in his entry, must accept the conditions of the reclamation act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.

42. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office.

All circulars or regulations in conflict with any of the regulations announced in this circular are hereby revoked.

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,
Secretary.

STATUTES.

AN ACT To provide for the sale of desert lands in certain States and Territories.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: *Provided,* That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

SEC. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

SEC. 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Approved, March 3, 1877 (19 Stat., 377).

AN ACT To repeal timber-culture laws, and for other purposes.

SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections:

"SEC. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the

mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

"SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act: *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to con-

test, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands and moneys paid therefor shall be forfeited to the United States.

"SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."

Approved, March 3, 1891 (26 Stat., 1095).

AN ACT Providing for the subdivision of lands entered under the reclamation act, and for other purposes.

SEC. 5. That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Approved, June 27, 1906 (34 Stat., 520).

AN ACT Providing for second desert-land entries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who prior to the

passage of this act has made entry under the desert-land laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the desert-land law as though such former entry had not been made, and any person applying for a second desert-land entry under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was assigned in whole or in part or canceled for fraud, or who relinquished the former entry for a valuable consideration.

Approved, March 26, 1908 (35 Stat., 48).

AN ACT Limiting and restricting the right of entry and assignment under the desert-land law and authorizing an extension of time within which to make final proof.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," as amended by the act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however*, That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

Sec. 2. That from and after the date of the passage of this act no assignment of an entry made under said acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said acts of the land conveyed by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Sec. 3. That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof, as required by said acts, of the completion of said work.

Approved, March 28, 1908 (35 Stat., 52).

CONFIRMATION-PROCEEDINGS BY GOVERNMENT-SEC. 7, ACT MARCH 3, 1891.

MENASHA WOODEN WARE COMPANY, ASSIGNEE OF WILLIAM GRIBBLE.

Any proceeding initiated by the land department before the expiration of two years from the issuance of final certificate, calculated to test the validity of an entry and the claimant's right to patent, is sufficient to bar confirmation under the proviso to section 7 of the act of March 3, 1891.

Opinion of Justice Stafford, of the Supreme Court of the District of Columbia, November 30, 1908.

This is a petition for a writ of mandamus to be issued to the Secretary of the Interior commanding him to withdraw an order of suspension and issue a patent to one of the petitioners. The land to which the proceeding relates is 160 acres of the public domain claimed to have been entered under the timber and stone act (20 Stat., 89) of June 3, 1878. The petitioner Gribble is the entryman and the petitioner corporation is his assignee. Gribble made the necessary cash payment and received his final receipt June 10, 1901. Thereafter he assigned to said corporation.

The ground of the petitioner's position is that no contest or protest was pending against his claim at the expiration of two years from said June 10, 1901, that is, on June 10, 1903; that if there was no pending contest or protest he was entitled to a patent and the respondent was bound to issue it as directed by section 7 of the act of March 3, 1891 (26 Stat., 1095). That section reads as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon a final entry of any tract of land under the homestead, timber-culture, desert land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

If on June 10, 1903, there was a contest or protest pending, the petitioners are plainly not entitled to a writ.

The situation on that date was this. The Commissioner of the General Land Office had ordered an investigation of this claim among others and had instructed a special agent to carry it on. No formal or specific charges were made and the investigation was ordered by reason of the fact that in several of the claims the same witnesses had been used. To the commissioner this appeared suspicious of fraud and to call for an inquiry into the facts. The commissioner had also instructed the special agent charged with the investigation to cross-examine the claimant and his witnesses and to make a prompt report thereon. It thus appears that the department was actively engaged in the investigation of the facts concern-

ing the validity of the claim under a declaration of doubt and suspicion touching its good faith.

The question then is whether this constituted a contest or a protest. It was not a *contest* in the sense that a special charge had been made, much less that notice thereof had been given to the claimant, so that it might be met by him. Neither was it a *protest* in the sense that a specific ground had been pointed out for the basis of the protest and the claimant informed thereof. But are either of these necessary? There was a solemn declaration by the department that the circumstances surrounding the claim were such as to beget suspicion and to call for a thorough investigation and that in the meantime the patent ought not to be granted. The very purpose of the investigation might be defeated if the claimant must be notified in advance. The investigation resulted, after June 10, 1903, in a report upon which there was a formal suspension of the patent and the case is still under consideration and undetermined for want of knowledge on the part of the department of the whereabouts of the claimant who should be served with notice.

As defined by Webster, a protest is "a solemn declaration of opinion, commonly a formal declaration against some act." Is not that exactly what this is? It was the first step in a proceeding calculated to test the validity of the claimant's right to a patent. That step having been taken within the two years the statute of confirmation did not operate upon this claim.

Consequently the petitioner's demurrer to respondent's answer must be overruled and the answer adjudged sufficient. It is so ordered.

HOMESTEAD ENTRY—"ONE QUARTER-SECTION"—SECTION 2289, R. S.

INSTRUCTIONS.

The term "one quarter-section" in section 2289, Revised Statutes, fixing the maximum area that may be taken as a homestead under that section, contemplates 160 acres, and an entry under that section must be limited to approximately that number of acres.

Applications under that section embracing in excess of 160 acres may be allowed where the excess is less than the deficiency would be if the smallest legal subdivision were eliminated.

Commissioner Dennett to Registers and Receivers, December 1, 1908.

On and after January 1, 1909, the following rule will be in force and effect:

The term "one quarter-section" as used in section 2289, United States Revised Statutes, is to be understood as meaning 160 acres. Therefore, an entry under said section must be limited to approximately 160 acres. Where such application is filed for lands in excess

of 160 acres, it may be allowed if the area in excess of 160 acres is not greater than the deficiency would be if the smallest legal subdivision were eliminated.

Instructions and decisions in conflict with above rule will not be followed after December 31, 1908, and entries made thereafter must conform to said rule.

The above rule is adopted in view of the following considerations. In the cases of John W. Douglas (10 L. D., 116) and Wood *v.* Bick (13 L. D., 520), and other cases, it was held that pre-emption and homestead claims may embrace lands in excess of 160 acres if the same be for what is in such decisions termed a technical quarter-section. In the said case of Douglass, a pre-emption claim, the lands consisted of six lots in the northeastern portion of the section aggregating an area of 201.05 acres. Following said decisions, this Department has permitted such entries to be made for the entire portion of a section, so-called a technical quarter-section. It is not believed, however, that it is accurate to use the term, a technical quarter-section, in designating an aggregation of lots surveyed and numbered simply because they lie within a certain portion of the section. A number of townships in various places are so surveyed that the section lines in the north and west tiers have to be elongated to reach pre-existing exteriors causing the areas of these fractional sections to aggregate as high as 2,000 acres each, and in such cases the so-called quarter-sections or "technical" quarter-sections run above 800 acres each. There are many townships in which so-called quarter-sections run considerably above 200 acres. Sometimes these so-called quarter-sections contain six lots, two of twenty acres each and the other four of forty acres each. It will be seen that in such cases an even 160 acres may be obtained, and it appears that entries should be limited to that area where possible.

It is clear that Congress, in enacting the homestead law, intended to allow ordinary homestead entries to embrace only 160 acres. The language is:

Shall be entitled to enter one quarter-section or less quantity subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands at two dollars and fifty cents per acre, to be located in a body in conformity to the legal subdivisions of the public lands.

It is also provided in said section that any person owning and residing on land may make an entry under said section for lands contiguous to his land, which shall not, with the lands so already owned and occupied, exceed in the aggregate "one hundred and sixty acres."

The said section was amended by section 5 of the act of March 3, 1891 (26 Stat., 1095), so as to provide that no person who is the proprietor of more than "one hundred and sixty acres of land in any state or territory shall acquire any right under the homestead law."

Section 2306, Revised Statutes, also provides for the making of an additional entry where the quantity theretofore entered is less than "one hundred and sixty acres." In the act of March 2, 1889 (25 Stat., 854), sections 5 and 6, provision is made for the allowance of additional homestead entries to an aggregate area of 160 acres. A like provision is also in section 2 of the act of April 28, 1904 (33 Stat., 527).

It seems clear that Congress intended to grant the right to enter the quantity of 160 acres and not a particular part of any section regardless of area. A section of land contains 640 acres; a quarter-section contains 160 acres. There seems no reason why an excess of that area should be allowed simply because the lands fall in a portion of the section designated as a technical quarter-section. Where the lands are divided into subdivisions and given lot numbers, it is not believed that the term "quarter-section" can properly be applied.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,
Secretary.

WILLIAM C. STAYT.

Motion for review of departmental decision of June 19, 1908, 36 L. D., 530, denied by First Assistant Secretary Pierce, December 1, 1908.

DESERT LAND ENTRY—EXTENSION OF TIME FOR PROOF—SEC. 3 ACT
MARCH 28, 1908.

JOHN S. TENDICK.

Section 3 of the act of March 28, 1908, authorizing an extension of time within which a desert land entryman may make proof of reclamation and cultivation, contemplates that unavoidable delay in the construction of the irrigating works by means of which the entryman intends to convey water upon his claim is the only ground upon which its provisions may be invoked; and in the absence of some actual, tangible work in the way of an irrigation system on the claim, a mere intention, or even contract, to obtain water from an irrigation system in the future, in event the practicability of such system be demonstrated by actual test, is not sufficient to warrant the extension authorized by the act.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 1, 1908.* (G. A. W.)

John S. Tendick has appealed from your office decision of September 17, 1908, holding for cancellation his desert land entry (No.

1524), made by John P. Dyer, his assignor, June 20, 1904, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33, T. 18 S., R. 26 E., Roswell, New Mexico, land district, in the event that he does not furnish, within sixty days from notice of your said decision, satisfactory evidence of the reclamation of the land involved, or that he is entitled to the benefit of the terms of section 3 of the act of March 28, 1908 (35 Stat., 52), allowing additional time within which to make final proof.

Dyer assigned his entry to claimant November 27, 1905. The local officers, on July 9, 1908, transmitted an affidavit of claimant, duly corroborated, in which it is stated—

That he has been, and will be, unable before the expiration of four years from date of entry to secure a sufficient amount of water to irrigate and reclaim said land; that he believes he will be able to secure a sufficient amount from the Antelope Canal and Reservoir, which is now being constructed and is so located that water can be conveyed directly to the above-described land; that he asks to have the time for making final proof extended on said land.

Your office held that the showing made by the claimant in this affidavit was not such as to warrant an extension of time in which to effect reclamation and cultivation of the land, in that it did not show why claimant had not secured a water right, how long it would be before he could secure one and make proof, or whether he was certain of being able to secure water from the Antelope Canal and Reservoir.

From claimant's correspondence with the General Land Office following your said decision of September 17, 1908, and from his appeal to this Department, it appears that he purchased Dyer's assignment for \$1,800, and has since expended about \$500 in improving the land; that the land is in the "artesian belt," and his expectation was to irrigate the land by means of an artesian well, but that so many of these wells were "playing out," or their flow, with a few exceptions, so small during the time water was needed, that he did not feel justified in having a well dug; that the only other source of a water supply, if any, for his claim, is the Antelope Basin Reservoir, which is in the course of construction; that the dam used in connection with this reservoir had once given way or been destroyed, and he did not feel justified in now expending about \$2,000 for a water right until it could be ascertained, by actual test, "whether or not the dam is secure and will stand the freshets or floods, and whether or not the reservoir will hold water and not drain off through the soil."

The provision of law under which claimant asks an extension of time in which to make proof of the reclamation and cultivation of his claim (section 3, act of March 28, 1908) is as follows:

That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works,

intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof as required by said acts of the completion of said work.

From the language of this act, it is clear that *delay* in the construction of irrigating works, whether a general system or a system irrigating only the land of the entryman, is the only ground upon which relief may be invoked. In the absence of a showing of some actual, tangible work, in the way of an irrigation system, on an entryman's claim, the act presupposes at least an existing uncontingent agreement to obtain water, and not a mere intention, or even a contract, to obtain water in the future provided the practicability of an irrigation scheme is demonstrated by actual test.

Apart from the natural construction of the language of the act, it is deemed proper to state that a policy permitting private individuals to hold segregated from entry portions of the public domain, on the mere possibility, or even a probability that a neighboring private irrigation system, constructed or in course of construction, will prove successful, would, it is believed, be fraught with dangerous possibilities for fraud and otherwise be contrary to a sound public policy.

For the reasons stated above, your office decision is affirmed.

ALASKAN TOWNSITES—STATUS AND RIGHTS OF INDIAN OCCUPANTS.

WRANGELL TOWNSITE.

The issuance of patent for a townsite in Alaska embracing lands claimed and occupied by Indians does not convey title to lands in the actual use and occupancy of the Indians or claimed by them at the date of the act of May 17, 1884, so long as such occupancy continues, or authorize the trustee to convey title to the Indian occupants; nor can such lands be subjected to taxation or charged or burdened with any obligation or incumbrance that could not lawfully be imposed upon public lands of the United States. Paragraph 8 of the Regulations of August 1, 1904, 33 L. D., 163, 167-8, amended.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 3, 1908.* (E. F. B.)

Under date of July 16, 1908, you report upon the petition of Indian occupants of lands within the surveyed boundaries of the townsite of Wrangell, Alaska, protesting against the inclosure of their possessions within said boundaries, alleging that they have no

voice in the government of the town and are too poor to pay the expense of a survey of their possessions. They also object to being taxed for the government of the town or for the support of schools, as their children are not permitted to attend said schools, the education of their children being provided for by the United States.

You report that the townsite has been surveyed, entered and patented, and that the description in the patent covers the land occupied by the Indians; that it has been subdivided into lots, blocks, streets and alleys, and that the holdings of the native Alaskans have all been located and nearly all have been staked according to the claim of each individual or family.

The mere fact that the boundaries of a townsite may include within its limits the holdings of native Alaskans is no reason why the survey should be rejected or reformed, provided none of the rights and privileges guaranteed to said Indians be defeated or impaired. The only question therefore that need be considered is whether the trustee shall set apart to each occupant the lot to which he is entitled by virtue of his occupancy and possession thereof—including native Alaskans as well as white men—and what terms and conditions may properly be imposed upon the property so apportioned in the possession of native Alaskans.

The right of Alaskan Indians to the possession of the lands in their actual use and occupancy, or claimed by them at the date of the passage of the act of May 17, 1884 (23 Stat., 24), was distinctly recognized by the 8th section of said act. It provided:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

Such recognition by Congress is sufficient to prevent the patenting of lands so occupied and claimed by Indians, either to such Indians or to others, in the absence of subsequent legislation by Congress. The patent to the townsite trustee therefore did not convey title to lands in the actual use and occupancy of native Alaskans or claimed by them at the date of the act of May 17, 1884, so long as such occupancy continues, or authorize the trustee to convey title to the Indians unless the 11th section of the act of March 3, 1891 (26 Stat., 1095), authorizing entry of lands in Alaska for townsite purposes for the several use and benefit of the occupants thereof, is the future legislation contemplated by the 8th section of the act of May 17, 1884, and confers upon said Indians the right to receive title from the trustees to the lots severally claimed or occupied by them. If it is, the title by patent would pass to the trustee charged with the trust of conveying to each occupant the title to the land severally occupied by them, whether white or native Alaskan. If not, the

patent could pass no title to any possession protected by the 8th section of the act of May 17, 1884, so as to prevent Congress from fixing by further legislation the character of title contemplated by said section.

The regulations of June 3, 1891, to carry into effect the provisions of the 11th section of the act of March 3, 1891, apparently construed said section as conferring authority for issuing of a title to the Indians for lands occupied by them within the limits of a townsite, as it directed the trustee to levy assessments "upon the property either occupied or possessed by any native Alaskan the same as if he were a white man" and to "apportion and convey the same to him according to his respective interest" (Sec. 26—12 L. D., 583, 595). These instructions were reissued as section 8 in the circular of August 1, 1904, now in force (33 L. D., 163).

In the case of *Kittie Clegeuh et al.* (28 L. D., 427) the Department had occasion to consider the relation of the 11th section of the act of March 3, 1891, to the 8th section of the act of May 17, 1884, and said that two views may be presented upon this question: One, whether the authority to enter lands for townsite purposes for the benefit of the several occupants and for the acquisition of title by each occupant according to his respective interest is the "future legislation" contemplated by the 8th section of the act of May 17, 1884, with reference to the acquisition of title to such lands by Indians in Alaska; and the other, whether it was not intended merely to extend the provisions of section 2387, Revised Statutes, to Alaska, and not to qualify persons to take title to town lots in Alaska who would not be qualified to take title to town lots under said section as elsewhere applied and administered.

Although it noted the apparent construction given to the act by the circular of June 3, 1891, it made no decision further than to say that—

In either view, no title to lands in the actual use and occupancy of Indians could be acquired by others under said section 11. If that section was not such "future legislation" as contemplated by the 8th section of the act of 1884, then the lands in the actual use and occupancy of Indians would not be subject to disposal under the townsite law, and if said section conferred upon the Indians the right to take title under the townsite law as extended to Alaska, no other person could lawfully acquire title to lands in the actual use and occupancy of the Indians, as the townsite entry was made solely for the several use and benefit of the occupants of the land entered.

Upon a careful consideration of this question the latter view seems to be the more reasonable interpretation of the act and accords with the uniform policy of the Government with reference to the character of title to lands that may be held and enjoyed by Indians. Congress had a purpose in withholding from these Indians the title to their possessions, especially without restraint upon alienation. It

protects them in their possessions under the legal title held by the United States by declaring in the act of May 17, 1884, that they shall not be disturbed in the possession of any lands actually in their actual use or occupation, or claimed by them at the date of that act.

Such recognition by Congress of a right of occupancy and possession prevents the acquisition of title to such lands without legislative authority, and while the title remains in the Government the Indians' right to occupancy can not be impaired nor can the land be assessed for taxes or charged or burdened with any obligation or incumbrance that could not be lawfully imposed upon public lands of the United States or other lands to which it holds the title. It was evidently contemplated by the act that these Indians should enjoy every right and privilege of a land owner except the right to encumber the land or to convey title thereto.

The purpose of Congress to withhold from natives of Alaska title to lands which they are allowed to occupy and possess is also indicated by the act of May 17, 1906 (34 Stat., 197), which authorizes allotments to any Indian or Eskimo residing in said district who is the head of a family or twenty-one years of age, and provides that "the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and non-taxable until otherwise provided by Congress."

As the instructions given in the 8th section of the circular of August 1, 1904, and in conflict with this view so far as they direct the trustee to levy assessments upon the lots occupied or possessed by native Alaskans "the same as if he were a white man," and authorizes such trustees to "apportion and convey the same to him according to his respective interest," the circular will be modified so as to conform to the view herein expressed. [See below.]

The papers are returned to your office with directions to take all further action in the premises in accordance herewith.

ALASKAN TOWNSITES—STATUS AND RIGHTS OF INDIAN OCCUPANTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 29, 1908.

Agreeably to Departmental decision of December 3, 1908 (37 L. D., 334), concerning the status and rights of Indian occupants in the townsite of Wrangell, Alaska, section 8 of the "Regulations concerning the manner of acquiring title to townsites on public lands in the District of Alaska" (33 L. D., 163), is hereby amended to read as follows:

In order to meet the expenses incident to the townsite entry and the execution of the trust thereunder, trustees of the several townsites entered in said District

shall levy assessments upon the property held or possessed by occupants other than Indian or native Alaskans, and shall apportion and convey the same to them according to their respective interests.

If the townsite includes lands possessed by Indian or native Alaskan occupants, such possessions shall not be assessed nor conveyed by the trustee pending the "future legislation" contemplated in section 8 of the act of May 17, 1884 (23 Stat., 24). In making the subdivisional survey required by section 9 of these regulations, the trustee will set apart the Indian possessions and appropriately designate them as such upon the triplicate plats of his survey, but he will not extend any street or alley upon or across such possessions.

FRED DENNETT, *Commissioner*.

Approved, December 30, 1908:

JAMES RUDOLPH GARFIELD, *Secretary*.

ANDREW J. BILLAN.

Motion for review of departmental decision of March 27, 1908, 36 L. D., 334, denied by First Assistant Secretary Pierce, December 7, 1908.

REPAYMENT—ACT OF MARCH 26, 1908.

JOSEPH GIBSON.

The purpose of the act of March 26, 1908, is to authorize repayment of purchase moneys and commissions paid in connection with applications to make "filing, location, selection, entry, or proof," and covered into the Treasury, in cases where, in the process of adjudication, the application, entry, or proof, was rejected and no fraud or attempted fraud in connection with the application appears.

The act of March 26, 1908, is merely supplemental to existing laws governing repayments, and does not authorize repayment where an entry properly allowed for land subject thereto fails of confirmation solely because of the fault or laches of the entryman.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 5, 1908.* (C. J. G.)

An appeal has been filed by Joseph Gibson from the decision of your office of August 31, 1908, denying application for repayment of the purchase money paid by him on desert land entry for the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 22 S., R. 58 W., Pueblo, Colorado.

The entry was made, October 17, 1899, and was canceled, on relinquishment, October 23, 1902, as to the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 29. The remainder of the entry was canceled, November 9, 1903, after notice to show cause, for failure to make third yearly proof. In the declaration filed by Gibson at the time of making said entry, he stated that he expected to obtain the water supply to irrigate

the land from a spring near the center of the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 22 S., R. 58 W., and by pumping water from the High Line Canal, an artificial stream below the land entered by him. In his application for repayment he stated that there was no fraud or attempted fraud in connection with the effort to obtain title to the land. In an affidavit accompanying his application here Gibson states that at the time of making his desert land entry he contemplated irrigating the same from a system of private reservoirs constructed by him, taking water from an arroyo and storing same for irrigation purposes; that there was no regular flow in the arroyo but he contemplated storing flood waters during the rainy season and using the same for irrigation during the dry period; that in furtherance of said irrigation scheme he constructed three reservoirs and also did a large amount of other work upon his claim; that at no time after the filing of his desert land claim was he able to secure sufficient water to permanently reclaim the land in the manner required by the desert land law, and that, in consequence of these conditions, he was finally compelled to abandon his claim.

The legislation governing repayments is found in the acts of June 16, 1880 (21 Stat., 287), and March 26, 1908 (35 Stat., 48). The former act, in section 2 thereof, authorizes repayment in cases where entries are canceled for conflict or where they have been erroneously allowed and can not be confirmed. The application of Gibson is made under section 1 of the act of March 26, 1908, which provides:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of fraud or attempted fraud in connection with such application.

This act is merely supplemental to prior laws governing repayments. It was not intended by such act to repeal or modify prior legislation on the subject. Its object was of course to afford relief in a class of cases wherein repayment was not theretofore authorized, viz, where money is covered into the Treasury "under any application to make any filing, location, selection, entry or proof" and, in the process of adjudication, such application, entry, or proof is rejected the party or his legal representatives not being guilty of fraud or attempted fraud in the premises. The primary purpose of the act is indicated in departmental letter of January 14, 1908, transmitting the original bill to Congress which reads as follows:

Heretofore and until recently all moneys deposited with applications and proofs for public lands have been retained temporarily by the receivers of

public moneys of the United States land offices and finally covered into the Treasury when the entries were allowed or returned by the receivers to the applicants in case their applications and proofs are rejected.

The fact that these moneys accumulated in the hands of the receivers largely in excess of their bonded liability called for a change in this practice, and to safeguard these funds all moneys of this kind are now and will hereafter be covered into the Treasury as soon as they are received.

Under the existing law there is no means of withdrawing any of these moneys from the Treasury for repayment to the persons whose applications and proofs are finally rejected, and I, therefore, herewith submit a proposed bill authorizing their repayment and recommend that it be enacted into law.

In the instructions of April 29, 1908 (36 L. D., 388), under the act of March 26, 1908, it was said:

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes, and to the act of June 16, 1880 (21 Stat., 287).

And referring to section 1 of said act of March 26, 1908, it was stated in said instructions:

This section refers more particularly to moneys covered into the Treasury of the United States, as directed in office circular "M" of May 16, 1907, (35 L. D., 568), and circular letter "M" of July 26, 1907; that is, moneys deposited with proof under the timber and stone, desert land, coal land, and mineral land laws.

The circular of May 16, 1907, above referred to, was issued in pursuance of the act of March 2, 1907 (34 Stat., 1245), entitled "An act to authorize the receivers of public moneys for land districts to deposit with the Treasurer of the United States certain sums embraced in their accounts of unearned fees and unofficial moneys," and, in paragraph 7 of said circular, it was stated:

As there is no provision for the repayment of such moneys from the Treasury, the Congress of the United States will be asked at its next session to provide relief in cases where the purchase money has been paid and application rejected without taint of fraud.

And in the instructions of your office of July 26, 1907, *supra*, to registers and receivers, supplemental to paragraph 7, it was said:

As there is no law under which repayment of any of these moneys may now be made, it is useless to submit applications for their return.

When the Congress shall have provided for the return of such purchase money in meritorious cases you will be fully advised and fully instructed regarding same.

While the act of March 26, 1908, may possibly contain, in addition to its primary object as set forth when transmitting the original bill to Congress and in the instructions issued thereunder, authority for repayment in exceptional cases where the same could not theretofore be made, yet it was clearly not meant to authorize repayment in those cases where the entries were properly allowed for land subject thereto, but which failed of confirmation solely because of the fault or

laches of the entryman. This entry was canceled because of Gibson's failure to submit yearly proof, a matter entirely within his control. In general circular of 1904, paragraph 10, page 39, it is set forth that a person making desert land entry must acquire a clear right to the use of sufficient water for the purpose of irrigating the whole of the land entered and of keeping it permanently irrigated, and that a person who makes a desert land entry before he has secured a water right does so at his own risk. The fact that Gibson was unable to secure sufficient water to irrigate his claim, which resulted in abandonment thereof by him, does not present a case where repayment would be authorized under the act of June 16, 1880. Nor is it one coming under the act of March 26, 1908, for, while the element of fraud or attempted fraud may be entirely absent, yet his application for the land was not rejected but on the contrary was accepted and the entry allowed thereon was canceled in part upon voluntary relinquishment, and as to the remainder because of failure to submit yearly proof thereon, as required by the act of March 3, 1891 (20 Stat., 1095), amendatory of the desert land act of March 3, 1877. Besides, it is provided in section 5 of said amendatory act:

If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled.

The decision of your office denying repayment is for the reasons given herein affirmed.

BACA FLOAT No. 3.

Motion for review of departmental decision of June 2, 1908, 36 L. D., 455, denied by First Assistant Secretary Pierce, December 5, 1908.

PORTERFIELD SCRIP—AFFIDAVIT OF NONOCCUPANCY—NOTICE.

JOHN D. ACKERMAN.

The provision in the act of April 11, 1860, that Porterfield warrants may be located only on lands "which have not been otherwise appropriated," contemplates lands *legally* appropriated; and an applicant to locate such a warrant is not required to file with his application an affidavit of nonoccupancy, it being only incumbent upon him to show, after such notice as may be required by the land department with a view to putting adverse claimants, if any, on notice, that there has been no prior legal appropriation of the land.

The circular of February 21, 1908, requiring publication of notice of all applications to locate scrip, warrants, certificates, soldiers' additional rights, or to make lieu land selections, filed on or after April 1, 1908, merely makes mandatory after that date what theretofore was within the discretionary power of the land department to require, and in no wise affects its authority to require notice of applications filed prior to that time.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, December 9, 1908.* (E. F. B.)

By decision of July 21, 1908, you required John D. Ackerman, who located Porterfield warrant No. 1, for forty acres, on the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, T. 3 S., R. 42 E., Carson City, Nevada, to file with his application an affidavit showing that the land is not occupied or improved by any one other than Ackerman, or those claiming through him, and he was notified that upon failure to do so his location would be canceled.

Your ruling was based upon the ruling of the Department in the case of Frederick W. McReynolds (35 L. D., 291), holding that lands actually occupied by another are not subject to location with Valentine scrip, whether such occupancy does or does not meet the requirements of the General Land laws, and that the question whether such occupant is qualified to assert and maintain a claim under the land laws of the United States will not be tried and determined under an application to locate said scrip. That decision followed the ruling of the Department in the case of Litchfield *v.* Anderson (32 L. D., 298), construing the words "vacant land opened to settlement" as they occur in the act of June 4, 1897 (30 Stat., 36), to exclude from location under the provisions of said act lands actually occupied, irrespective of the character of such occupancy.

In the McReynolds case it was held that there is no material distinction between the words "vacant land opened to settlement" in the act of June 4, 1897, and the words "unoccupied and unappropriated lands" in the act authorizing the issuance and location of Valentine scrip.

The act of April 11, 1860 (12 Stat., 836), authorizing the issuance of Porterfield warrants, provides that they may be located on lands "which have not been otherwise appropriated." These words have been construed by the Department to mean that such scrip is locatable on lands not legally appropriated, and that lands may be occupied so as to exclude them from location with Valentine scrip or selection under the act of June 4, 1897, and not be legally appropriated within the meaning of the act of April 11, 1860.

Such was the construction given to that act by the Department in the case of Lewis *v.* Seattle (1 L. D., 497), and as that decision is not in conflict with, and is not overruled by, the decisions of the Depart-

ment in the cases of *Litchfield v. Anderson* and *Frederick W. McReynolds, supra*, it was error to hold that this location is to be controlled by those decisions.

It is not intended to pass upon and determine any question as to the respective rights of any adverse claimant to said land, or to hold that your office may not require the locators of Porterfield warrants, or the locators of any scrip, especially such as may be located on unsurveyed lands, to give notice of the location of such scrip to any person who may be claiming adversely to the locator, whether such adverse claim be well founded or not, but merely to hold that the failure to file with the application for location an affidavit of non-occupancy, as required in Valentine scrip locations and selections under the act of June 4, 1897, will not of itself be such a defect in the application as to require that it be rejected, but the locator may show that such adverse claim is not a bar to such location.

The circular of February 21, 1908 (36 L. D. 278), requires that in all cases of applications to locate any scrip, warrants, certificates, soldiers' additional homestead rights, or to make lieu land selections after April 1, 1908, the locator is required to file such affidavits and to give such notice as will put any one claiming adversely to the location on notice, in order that he may defend his claim. That circular applies to warrants of this character, as well as to all other warrants and scrip located after April 1, 1908, but there is no reason why your office may not require notice to be given in locations made prior to that date, when you have reason to believe that there is an adverse claim to the land.

Your decision is modified accordingly, and the papers are returned for such disposition as you may deem proper in consonance with the views herein announced.

CALIFORNIA SCHOOL LAND-INDEMNITY SELECTION-ACT OF MARCH 1, 1877.

BERTIE E. HARDESTY.

Where an illegal indemnity school selection was made by the State of California, and neither the State nor the United States has consented to a ratification thereof under the act of March 1, 1877, a third party, not claiming any right or title growing out of such illegal selection, will not be heard to question the right of the United States and the State to adjust the grant between themselves as to the land involved.

First Assistant Secretary Pierce to the Commissioner of the General (F. W. C.) Land Office, December 11, 1908. (E. F. B.)

By decision of February 28, 1907, you held for cancellation the homestead entry of Bertie E. Hardesty, made September 25, 1906,

of the NW. $\frac{1}{4}$, Sec. 16, T. 4 S., R. 4 W., Los Angeles, California, for the reason that the land was part of the grant to the State of California for school purposes, and April 20, 1908, you denied a motion for review of said decision.

The controlling question presented by this appeal is whether the land belongs to the State of California as part of its school grant, or is public land of the United States.

It appears from the statement of facts in your decision that the State of California in 1868 selected other lands as indemnity in lieu of the W. $\frac{1}{2}$ of said Sec. 16, which was approved in 1871, but said selection was canceled July 14, 1882, for the reason that the records of your office showed that at the date of selection the west half of said Sec. 16 was in place and a purchaser from the State of the indemnity land was allowed to make cash purchase of the same from the United States, and that the State again made selection of said indemnity based upon the same half of said Sec. 16, which was canceled June 29, 1885.

In 1886 the State sold said section sixteen to William Gregory, and issued a patent to him, June 25, 1887, but the land was reconveyed to the State November 13, 1900.

Appellant contends that as the indemnity selection had been made and approved to the State prior to the passage of the act of March 1, 1877 (19 Stat., 267), and was a subsisting selection at the date of that act, the title of the State attached absolutely upon the passage of said act, and that the title to that part of the school section used as a base therefor was by force of the statute reinvested in the United States in exchange for the illegal indemnity selection which was confirmed by said act.

Appellant has correctly stated the general rule applicable in cases arising under the act of March 1, 1877, as construed by the Department and the courts (see *White v. Swisher*, 36 L. D., 22, and authorities therein cited). But it is not applicable in this case, for the reason that neither the State nor the United States consented to such exchange, either expressly or by implication, and as appellant is not claiming under any right or title derived from any source and growing out of such illegal selection, she can not be heard to question the right of the United States and the State, as between themselves, to adjust the grant with reference to said half section, as the only person who would be affected thereby is the purchaser of the indemnity land who purchased from the United States as public land, and not from the State of California.

The decision of the Department in the case of *Martin A. Baker* (14 L. D., 252) does not sustain the contention of appellant that said section was by reason of the pending indemnity selections at the date of the act of March 1, 1877, restored to the public domain, to be dis-

posed of as other public lands of the United States. The land involved in that case was the east half of said section sixteen, but the selection was never canceled, and was certified to the State, and the United States took in lieu of it the land in place. The selection made in lieu of the west half of the section was canceled, and the purchaser from the State was allowed to purchase it from the United States, so that the right of the State to land in place was expressly recognized, and, acting under such recognition, it sold the land as school land in 1886, and re-acquired title to it in 1900.

The cancellation of the indemnity selection in 1885 and the sale of it to the State's purchaser as public land may have been irregular, but that conferred no right upon appellant to question the validity or invalidity of the title to the base or the indemnity.

Nor does the fact that your office may have inadvertently allowed entry of some part of said west half of said section sixteen afford any ground for the allowance of this entry.

Your decision is affirmed.

PUBLIC LANDS—ARKANSAS SUNK LANDS.

ARKANSAS SUNK LANDS.

The unsurveyed lands in the basin of the St. Francis river, State of Arkansas, lying beyond the exterior lines of the adjoining surveyed townships, and commonly known as the "sunk lands," are held to be public lands of the United States and directions are given for their survey with a view to disposal under the public land laws.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, December 12, 1908.* (F. W. C.)

The question presented in this case is as to whether the United States has such an interest in and to certain lands commonly known as "sunk lands," lying within the basin of the St. Francis River, in the State of Arkansas, beyond the exterior lines of certain townships, as heretofore surveyed at various dates between 1845 and 1849, as would warrant an order for the survey of such lands by the extension of the lines of survey of the townships as they now exist, or otherwise, with a view to their disposition as public lands.

It seems from the record as now presented that the lands in question will possibly all be within the exterior lines of the townships 11 to 16 north, range 6 east, and 12 to 17 north, range 7 east, if such exterior lines of said townships are so extended as to complete the townships as usually surveyed, but it may be that there are other lands similarly circumstanced lying without the boundary of said townships.

The plats of survey of the townships above mentioned, now on file, show the townships to be fractional, varying in amount of land returned thereunder from a little less than one-third of a normal township to nearly a full or complete township as usually surveyed. The lands within the surveyed lines of these townships were practically all swamp in character and were selected by the governor of the State under the swamp land grant of September 28, 1850 (9 Stat., 519).

In reporting these selections, so far as made by townships, the surveyor-general, in the lists submitted to the land department, described them as fractional with areas agreeing with the amount of lands returned by the plats of the public survey. Further, appended to the lists, including the townships above described, is the following certificate signed by the surveyor-general:

I hereby certify that the above and foregoing list, marked A, is a true and correct transcript from the originals filed in the office of the surveyor-general by the governor of the State of Arkansas, with only such modifications as to make the description of the several tracts agree with the plats on file in this office.

The original lists of selections filed with the surveyor-general are not before the Department, and it is not material to inquire what was the intention of the State with respect to said selections—that is, whether it was the intention to select all that might be included within the exterior lines of the township as then or thereafter surveyed, or whether it was intended merely to make the selections conform to the existing surveys—for it is clear from the lists, as reported by the surveyor-general, that he reported only the selections so far as they include surveyed lands, and that it was his intention to modify the selections as presented by the State to agree with the plats of survey then on file in his office, if the selections made by the State were more extensive than those reported.

Patents issued upon the reported selections between July 29, 1856, and February 11, 1871, and in each instance the patent referred to the plats of public survey on file, for identification of the land conveyed; so that it is clear that the patents conveyed nothing beyond the exterior lines of the public survey.

It is now quite certain that beyond the meandered lines of the several townships as surveyed between 1845 and 1849, there were, at the time of the public survey, many acres of land entirely uncovered by water, or perhaps subject to periodical overflow but not covered by a permanent body of water. This has been adjudicated, at least as to a portion of the lands here in question, in the case of *Chapman and Dewey Land Co. v. Bigelow* (77 Ark., 338; 92 S. W., 534). In that case the Supreme Court of Arkansas decided that the lands there in controversy were swamp lands, checked by bayous, subject

to inundation, but reclaimable for agricultural purposes, and, hence, were not of a character on which to predicate riparian rights. It may be assumed, therefore, that the greater part of the excluded or unsurveyed area in the St. Francis basin, was in fact swamp land at the date of the swamp land grant of 1850.

The decision of the Arkansas court in the case above referred to was brought on a writ of error to the Supreme Court of the United States and was there dismissed for want of jurisdiction (206 U. S., 41). The United States was subsequently requested to intervene in order to secure a rehearing of the case, but the request was denied. Prior to this time, your office had secured reports from a special agent tending to show strongly the swampy character of these lands in 1850, and in your letter of October 31, 1907, you suggested that a careful and thorough preliminary investigation of the matter should be made with a view to ascertaining all the facts necessary to afford the basis for a determination as to whether or not said lands are unsurveyed public lands of the United States. The suggestion of your office was approved, and under date of February 25, 1908, your office submitted the report of Inspector Wadsworth and expressed the opinion that the lands should be surveyed and treated as a part of the public domain, but in view of the request of many adversely affected by such a course, your office suggested that they should be afforded opportunity to be heard. February 29, 1908, the Department authorized your office to invite all persons interested to appear and present by brief or otherwise their claims and their reasons why final steps, such as the proposed survey, etc., should or should not be taken. Many persons have appeared, and by brief and oral arguments presented their claims and views. It is thus that the matter is now before the Department for determination of the nature and extent of the government's interest in said land.

There are those who are squatters on certain tracts, indisputably dry land in 1846 to 1850, contending that the title is in the United States and urging that the land be surveyed and disposed of under federal laws; on the other hand, the Chapman and Dewey Land Company, as riparian owners, protest against the survey, contending that the United States has no interest in land beyond the exterior lines of the existing survey, which it is claimed is an accretion to the surveyed lands heretofore disposed of. The St. Francis Levee District joins with the riparian claimants in protesting against the survey, maintaining that the land was really swampy in character in 1850 and, as such, passed to the State and to said district through the operation of an act of the State Legislature passed in 1893 creating said district. Other litigants appeared, claiming adversely to the United States under either one or the other of these conflicting positions.

It is, of course, unnecessary to determine or pass upon the respective rights of these parties, except in so far as they affect the question as to the right of the United States, for should it be determined that the United States have already parted with title, no survey should be ordered, and the question of present ownership as between the parties adversely contending should be left to the courts to decide.

It seems clear from what is now before the Department that a permanent body of water did not occupy these lands at the time of the public survey, and that, except as to a portion shown to be high and dry uplands, sometimes referred to as islands, the greater body of the land was swampy and overflowed land both at the date of the public survey and the passage of the swamp-land grant of 1850. The failure to further extend the lines of the public surveys in no-wise defeated the right of the State to the lands beyond, upon their identification by an appropriate survey.

By the agreement of compromise and settlement entered into between the United States and the State of Arkansas, which was approved by the act of April 29, 1898 (30 Stat., 367), it was agreed between the parties "that the land now patented, approved or confirmed to the State of Arkansas under the acts of September 28, 1850, March 2, 1855, and March 3, 1857, shall constitute the full measure due the State under the said swamp-land acts, except, however, that the lands described in the following lists shall be patented to the State."

In addition to the above, the third section of the act approving the agreement provided:

That the title of all persons who have purchased from the State of Arkansas any unconfirmed swamp land and hold deeds for the same, be, and the same is hereby, confirmed and made valid as against any claim of right of the United States, and without the payment by said persons, their heirs or assigns, of any sum whatever to the United States or to the State of Arkansas.

From what has heretofore been said it clearly appears that the lands the subject of this inquiry have never been patented to the State under its swamp-land grant, and, as a consequence, have never been approved to the State, for they could only have been approved preliminary to their patenting; also that they have never been included in any list of swamp lands reported by the surveyor-general, and, therefore have never been confirmed to the State, for the only confirmatory act with regard to the swamp-land grant is the act of March 3, 1857 (11 Stat., 251), which provides:

That the selection of swamp and overflowed lands granted to the several states . . . heretofore made and reported to the Commissioner of the General Land Office, so far as the same remain vacant and unappropriated, and not interfered with by any actual settlement or any existing law of the United States, be, and the same are hereby, confirmed and shall be approved and patented to the several states.

It can further be said that these lands were not included in any of the lists referred to in the agreement.

While the St. Francis Levee District lays claim to these lands through the act of legislature passing to the district all swamp lands within its boundaries, yet they make no claim to holding deeds for any particular tracts, and as they are not returned by the State as purchasers in the list of sales reported by the State on June 2, 1898, hereinafter referred to, it may safely be said that they are not within the protection extended by the third section of the act of 1898, approving the agreement of compromise. Therefore, the United States, through the compromise, succeeded to whatever interest the State possessed under the swamp-land grant of 1850, in and to the lands the subject of this inquiry.

In evidence that the State recognized that it had a claim to the lands in this depressed strip or basin under its swamp-land grant of 1850, as lands in place, beyond the lines of the public survey; that it did not claim title thereto by reason of any selection or patent theretofore made or issued under the swamp-land grant; and that this interest would pass to the United States under the agreement, attention may be called:

First, to the fact that in 1892 the State made formal selection of 563 acres without the meandered lines of the survey of T. 12 north, R. 6 east, as made in 1850, which tract was sold by the State to one Mallory, the boundaries of the tract having first been established by an independent survey. Further, in the list of sales reported by the State under the third section of the confirmatory act was also included certain lands, defined by independent survey, within the limits of what has been known as Big Lake and Bagwell's Lake, forming part of these "sunk lands," which tract was reported to have been sold to the Arke-delphia Lumber Company and others.

Second, although the patents for the surveyed adjoining tracts issued many years ago, no claim was ever asserted by the State or any of its transferees to further lands under selections made and patents issued thereon, until the present controversy arose.

Third, when the compromise agreement was under consideration it was represented by the agent acting for the State that there remained over and above the lists of lands then claimed by the State other swamp lands to the amount of 400,000 acres, including "about 50,000 acres of what are known as 'sunk lands,' heavily timbered, and not yet surveyed." (Senate Doc. No. 155, 54th Cong., First Sess., page 26; Senate Report No. 76, 54th Cong., First Sess., page 6.)

From the present showing as to the known character of the lands beyond the exterior lines of the survey heretofore made, about the time such survey was executed, it seems clear that such mistake was

made in not extending the lines of the public survey over and upon the lands here in question as would not conclude the rights of the State had no agreement of compromise been entered into, and should not therefore conclude the rights of the United States in regard to these lands. (See *Niles v. Cedar Point Club*, 175 U. S., 300; *Kean v. Calumet Canal and Improvement Co.*, 190 U. S., 452, 490; and *Security Land & Exploration Co. v. Burns*, 193 U. S., 167, 187.) The action of the State, the original grantee from the United States of the surveyed lands, in having independent surveys made of portions of these lands, selecting and seeking patent thereto under its grant, shows clearly that it was not deceived thereby and did not treat the meander line as final.

As against this claim of proprietorship on the part of the State, no claim seems ever to have been made by those purchasing patented lands immediately adjoining the lands here in question, from the State, and it may safely be said that no claim to these lands by the present riparian claimants would ever have been made but for the elimination of the State under the compromise agreement.

I am therefore of opinion that neither the claim of the Chapman and Dewey Land Company nor of the St. Francis Levee District should prevent or interfere with assertion by the United States of its claim in and to these lands.

Before concluding the matters under consideration and giving direction with respect to these lands, it is thought advisable to give attention to the fact that on November 17, 1902, the Department declined to give direction for the survey of these lands, holding that the integrity of the original surveys showing the existence of actual bodies of water properly meandered had not been impeached. This was urged on the Department at the recent hearing as such an adjudication of the matter as should not now be disturbed. With respect thereto, it is but necessary to say that in the action hereinbefore referred to brought by the Chapman and Dewey Land Company to quiet the title to certain portions of the land here involved, they made an unsuccessful attempt to introduce this letter in evidence. It was rejected, however, because it was held to be merely an expression of opinion and not a decision or adjudication of a contest or controversy involving title to public lands, and it is not believed that such expression of opinion then made precludes the action now about to be taken.

The entire matter considered, it is directed that you cause appropriate steps to be taken for the survey of these lands that they may be brought under the operation of the laws governing the disposal of like public lands.

SCRIP—APPLICATION TO LOCATE UPON UNSURVEYED LAND.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., December 22, 1908.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: Under regulations of June 17, 1874 (1 C. L. L., 806), relative to Valentine Scrip, and May 28, 1878 (2 C. L. L., 1355), relative to Sioux Half Breed Scrip, such scrip, and other kinds of scrip locatable on unsurveyed land, when located upon such land, have been retained with the location papers in local offices until the survey of the township embracing the land applied for has been made, the official plat filed, and the location adjusted to the survey.

It is deemed advisable to discontinue this practice. You are accordingly directed to transmit to this office, at once, all applications to locate scrip on unsurveyed land, together with the scrip, which were filed in your offices prior to April 1, 1908, with separate report in each case as to the status of the land applied for, and all other material facts affecting the case; also, with proper report, all applications and scrip for unsurveyed land, filed subsequent to April 1, 1908, after the applicant has complied with the regulations of February 21, 1908 (36 L. D., 278). In all cases you will see that your records show, in complete manner, the pendency of the application to locate such scrip. The papers will be kept in this office.

When survey has been made of the land involved in any application, and the plat has been filed in your office, you will promptly call the attention of this office to such application, giving such information as the records of your office indicate should be furnished concerning the application.

The applicant will be required, within three months from the date of the filing of the official plat of survey of the township embracing the land applied for, to make proof, in the form of an affidavit, corroborated, showing the legal subdivisions of his claim; whereupon the location, in the absence of any valid objection, will be consummated, and the location certificate, and other papers, will be transmitted to this office with your regular monthly returns. Should the applicant fail to make the adjustment, you will report the fact to this office, when appropriate action will be taken.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

DON P. DICKINSON.

Motion for review of departmental decision of October 29, 1908, 37 L. D., 216, denied by First Assistant Secretary Pierce, December 28, 1908.

REPAYMENT—RELINQUISHMENT—ACT OF MARCH 26, 1908.

PETER A. C. HAUSMAN.

A relinquishment filed with an application for repayment, in compliance with the terms of the repayment statute, should be treated as part of such application and accepted only in event of approval of the repayment claim. The act of March 26, 1908, does not repeal or modify existing laws governing repayments, nor does it authorize or contemplate the reopening of cases properly adjudicated under prior laws.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, December 28, 1908. (C. J. G.)

An appeal has been filed by Peter A. C. Hausman from the decision of your office of October 26, 1908, denying his application for repayment of the purchase money paid on the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 19, T. 39 N., R. 10 W., the same being part of a cash entry made by him at Springfield, Missouri.

The entry was made August 11, 1906, and was canceled on relinquishment as to the land described September 1, 1906. At the time of filing relinquishment Hausman also made application for repayment, which was denied by your office January 14, 1907, on the ground that said relinquishment was entirely voluntary, the facts thus not presenting a case in which repayment is authorized under the act of June 16, 1880 (21 Stat., 287). This action was affirmed by the Department March 16, 1907, and a motion for review was denied April 11, 1907, it being stated, among other things:

If the statements made by Hausman in support of his application be true there is little question as to the equities of his claim. But the difficulty is, repayment can only be made where there is specific statutory authority therefor. It is not claimed that this entry was erroneously allowed and could not have been confirmed in its entirety but for Hausman's relinquishment. Upon the facts of the case said relinquishment can be regarded in no other light than a voluntary act. According to Hausman's own statement, after he made entry another party filed application for a portion of the land covered thereby, which application was rejected because of said entry. He thereupon for certain philanthropic reasons stated by him, relinquished said portion in favor of the other party, although expressing the belief that said party had through sleeping on his rights lost the same. Under the circumstances the entry can not be regarded as having been canceled in part for conflict within the purview of the repayment act; in fact according to his own belief no conflict existed. In any event no conflict is conclusively shown to have existed, by hearing or otherwise.

The present application of Hausman is made under the act of March 26, 1908 (35 Stat., 48), section 1 of which provides:

That where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.

Your office denied the application for repayment under this act on the ground that no part of the entry was "rejected," as "it can not be said of an entry voluntarily relinquished that the same was rejected by the government."

From the further showing now made it would appear that Hausman's relinquishment was filed only in compliance with the statute relating to repayment and as part of his application for repayment. It was apparently mistaken and treated as an independent and voluntary relinquishment, and his entry was canceled in part accordingly. If the foregoing be true, then such cancellation was erroneous, as a relinquishment thus presented should be treated as part of the repayment application, and accepted only in the event of the approval of such application.

According to Hausman's own statement the relinquishment of part of his entry was not due to any recognized conflict with a prior claim to the land; so that, as said by the Department in denying motion for review in the matter of his former application for repayment:

Under the circumstances, the entry can not be regarded as having been canceled in part for conflict within the purview of the repayment act; in fact, according to his own belief, no conflict existed. In any event no conflict is conclusively shown to have existed, by hearing or otherwise.

While the purchase money paid on the canceled portion can not be refunded under the act of June 16, 1880, as heretofore held, yet from the showing now made it would appear that Hausman's relinquishment could fairly be regarded as having been filed solely for the purpose of complying with the terms of that act and securing repayment. The act of June 16, 1880, however, does not include the erroneous cancellation of an entry among the cases where repayment of purchase money is authorized. Thomas Hammond, 26 L. D., 419. Therefore the only relief that could be afforded would have been the reinstatement of the canceled portion of his entry, in the absence of any adverse claim. But on this point it appears that the land relinquished was subsequently entered by another party.

As to the act of March 26, 1908, it was not its purpose to repeal or modify the then existing laws covering repayments, but merely to supplement such laws. Its history shows that the primary object was to authorize repayment of moneys deposited in the Treasury in pursuance of the act of March 2, 1907 (34 Stat., 1245). In paragraph 7 of circular of May 16, 1907 (35 L. D., 568, 570), under said act, it was stated:

As there is no provision for the repayment of such moneys from the Treasury, the Congress of the United States will be asked at its next session to provide relief in cases where the purchase money has been paid and the application rejected without taint of fraud.

In the instructions of your office of July 26, 1907, to registers and receivers, supplemental to said paragraph 7, it was said:

As there is no law under which repayment of any of these moneys may now be made, it is useless to submit applications for their return.

When the Congress shall have provided for the return of such purchase money in meritorious cases, you will be duly advised and fully instructed regarding the same.

The purpose of said act of March 26, 1908, is further indicated in departmental letter of January 14, 1908, transmitting the original bill to Congress, as follows:

Heretofore and until recently all moneys deposited with applications and proofs for public lands have been retained temporarily by the receivers of public moneys of the United States land offices, and finally covered into the Treasury, when the entries were allowed or returned by the receiver to the applicants in case their applications and proofs are rejected.

The fact that these moneys accumulated in the hands of the receivers largely in excess of their bonded liability called for a change in this practice, and to safeguard these funds, all moneys of this kind are now and will hereafter be covered into the Treasury as soon as they are received.

Under the existing law there is no means of withdrawing any of these moneys from the Treasury for repayment to the persons whose applications and proofs are finally rejected, and I, therefore, herewith submit a proposed bill authorizing their repayment, and recommend that it be enacted into law.

In the instructions of April 29, 1908 (36 L. D., 388), under the act of March 26, 1908, it was said:

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes, and to the act of June 16, 1880 (21 Stat., 287).

Referring to section 1 of said act, it was stated in said instructions:

This section refers more particularly to moneys covered into the Treasury of the United States as directed in office circular "M" of May 16, 1907 (35 L. D., 568), and circular letter "M" of July 26, 1907; that is, moneys deposited with proof under the timber and stone, desert land, coal land, or mineral land laws.

Clearly it was not meant by the act of March 26, 1908, to reopen cases properly adjudicated under prior laws. In this case, while the

element of fraud, or attempted fraud, is apparently absent, yet Hausman's application or entry was not rejected by the government, but on the contrary his application for all of the land described by him was accepted, and the entry allowed thereon was partially canceled, only because of his relinquishment and surrender of claim thereunder, which he explains as follows:

That he entered the said land in good faith believing that he had legal right to enter same and which he still believes, but that two days after he entered the said land a homestead application was made on the said tract by another party which, for reason of his entry, was rejected, that he, the said Hausmann, believes that the said applicant had through sleeping on his rights lost them, but that inasmuch as the acreage involved is small and the land of little value and for the further reason that he desires to assist rather than prevent the settlement of the unoccupied lands in this locality he agreed with the said homestead applicant to request of the Honorable, the Commissioner of the General Land Office the cancellation of the said cash entry and the return to him of the fees and commissions paid so that the party who made homestead application may again do so if he so desires.

Even conceding under all the circumstances that the cancellation in part of Hausman's entry was erroneous, and, while recognizing the evident equities of his claim, still, as money once covered into the Treasury can not be withdrawn except in accordance with specific statutory authority, there is no existing law under which the purchase money paid thereon can be returned to him.

The decision of your office is affirmed.

**HOMESTEAD ENTRIES WITHIN NATIONAL FORESTS—SUPERSEDING
CIRCULAR OF JULY 23, 1907.**

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., December 16, 1908.

Registers and Receivers, United States Land Offices.

SIRS: Your attention is called to the act of June 11, 1906 (34 Stat., 233), copy of which is hereto attached as Appendix A. This act authorizes homestead entries for lands within national forests, and you are instructed thereunder as follows:

1. Both surveyed and unsurveyed lands within national forests which are chiefly valuable for agriculture and not needed for public use may, from time to time, be examined, classified, and listed under the supervision of the Secretary of Agriculture, and lists thereof will be filed by him with the Secretary of the Interior, who will then declare the listed lands subject to settlement and entry.

2. Any person desiring to enter any unlisted lands of this character should present an application for their examination, classification, and listing to the district forester for the district in which the land is located in the manner prescribed by regulations issued by the Agricultural Department. (The present regulations are attached as Appendix B.)

3. When any lands have been declared subject to settlement and entry under this act, a list of such lands, together with a copy of the notice of restoration thereof to entry and authority for publication of such notice, will be transmitted to the register and receiver for the district within which the lands are located. Upon receipt thereof the register will designate a newspaper published within the county in which the land is situated and transmit to the publishers thereof the letter of authority and copy of notice of restoration, said notice to be published in the designated newspaper once each week for four successive weeks. You will also post in your office a copy of said notice, the same to remain posted for a period of sixty days immediately preceding the date when the lands are to be subject to entry. If no paper is published within the county, publication should be made in a newspaper published nearest the land.

4. The cost of publishing the notice mentioned in the preceding paragraph will not be paid by the receiver, but the publisher's vouchers therefor, in duplicate, should be forwarded to the Department of the Interior, Washington, D. C., by the publisher, accompanied by a duly executed proof of publication. The register will require the publisher to promptly furnish him with a copy of the issue of the paper in which such notice first appears, will compare the published notice with that furnished by this office, and in case of discrepancy or error cause the publisher to correct the printed notice and thereafter publish the corrected notice for the full period of four weeks.

5. In addition to the publication and posting above provided for, you will, on the day the list is filed in your office, mail a copy of the notice to any person known by you to be claiming a preferred right of entry as a settler on any of the lands described therein, and also at the same time mail a copy of the notice to the person on whose application the lands embraced in the list were examined and listed, and advise each of them of his preferred right to make entry prior to the expiration of sixty days from the date upon which the list is filed.

6. Any person qualified to make a homestead entry who, prior to January 1, 1906, occupied and in good faith claimed any lands listed under this act for agricultural purposes, and who has not abandoned the same, and the person upon whose application such land was listed, has, each in the order named, the preferred right to enter the lands so settled upon or listed at any time within sixty days

from the filing of the list in your office. Should an application be made by such settler during the sixty-day period you will, upon his showing by affidavit the fact of such settlement and continued occupancy, allow the entry. If an application is made during the same period by the party upon whose request the lands were listed, you will retain said application on file in your office until the expiration of the sixty-day period, or until an entry has been made by a claimant having the superior preference right. If no application by a bona fide settler prior to January 1, 1906, is filed within the sixty-day period, you will allow the application of the party upon whose request the lands were listed. If entry by a person claiming a settler's preference right is allowed, other applications should be rejected without waiting the expiration of the preferred-right period. Of the applicants for listing, only the one upon whose request a tract is listed secures any preference right. Other applicants for the listing of the same tract acquire no right by virtue of such applications.

7. The fact that a settler named in the preceding paragraph has already exercised or lost his homestead right will not prevent him from making entry of the lands settled upon if he is otherwise qualified to make entry, but he can not obtain patent until he has complied with all of the requirements of the homestead law as to residence and cultivation and paid \$2.50 per acre for the land entered by him.

8. When an entry embraces unsurveyed lands, or embraces an irregular fractional part of a subdivision of a surveyed section, the entryman must cause such unsurveyed lands or such fractional parts to be surveyed at his own expense by a reliable and competent surveyor, to be designated by the United States surveyor-general, at some time before he applies to make final proof. Survey will not be required when the tracts can be described by legal subdivisions, or as a quarter or a half of a surveyed quarter-quarter section or rectangular lotted tract, or as a quarter or a half of a surveyed quarter-quarter-quarter section or rectangular lotted tract.

9. Application for survey must be made by the homestead claimants or their duly authorized attorneys to the United States surveyor-general of the State wherein the land is situated. The applications must describe the claim to be surveyed by metes and bounds following the description contained in the listing and entry. The claimant may designate the surveyor he desires to do the work, who will, in the absence of objection, be authorized so to do by the United States surveyor-general. Surveys will be numbered by the United States surveyor-general consecutively when the orders for survey are issued, beginning with No. 37, thus "H. E. S. No. —."

The surveys must be actually made on the ground by the surveyor designated by the United States surveyor-general, must be in strict conformity with or be embraced within the area described in the listing and entry, and the field notes and preliminary plat promptly returned to the surveyor-general.

10. The corners of each claim must be numbered consecutively, beginning with No. 1; the corner and survey numbers must be neatly chiseled or scribed on the side (facing the claim) of the stone, post, or rock in place marking the corner. The corners may consist of a stone not less than 24 inches long, set 12 inches in the ground; a post not less than 3 feet long by 4 inches square, set 18 inches in the ground, or a rock in place. Corner No. 1 of each claim must be connected by course and distance with an established corner of the public surveys, or if there be no corner within a reasonable distance, with a United States location monument which may be established by the surveyor at some prominent point in the vicinity, and may consist of a stone not less than 30 by 20 by 6 inches, set 15 inches in the ground, or a post 8 feet long 6 inches square, set 3 feet in the ground. The words U. S. L. M. and number of the monument should be chiseled or cut upon the side of the monument and a detailed description thereof furnished the surveyor-general by the surveyor. Such bearings from the corners of the claims and U. S. L. monuments should be taken to near-by prominent objects as will serve to identify the locus of the claim. Upon the return of the field notes of survey, which must be verified by the affidavit of the surveyor, executed before any officer qualified to administer oaths and having a seal, and the preliminary plat, the surveyor-general will cause same to be examined, and if found regular, approve the same and cause to be prepared three sets of field notes and four plats of the claim, deliver to the claimant one plat to be posted on the claim; transmit two plats and two sets of field notes to the register and receiver of the local land office, one set to be forwarded to this office, with the final proof of claimant, and one plat and field notes to be retained in the office of the surveyor-general. Action upon applications for survey and upon the surveys when returned must be promptly had. Surveys of homestead claims heretofore made may be accepted and approved by surveyors-general if in substantial conformance to the requirements herein set forth.

11. The commutation provisions of the homestead laws do not apply to entries made under this act, but all entrymen must make final proof of residence and cultivation within the time, in the manner, and under the notice prescribed by the general provisions of the homestead laws, except that all entrymen who are required by the preceding paragraph to have their lands, or any portion of them, surveyed must, within five years from the date of their settlement,

present to the register and receiver their application to make final proof on all of the lands embraced in their entries, with a certified copy of the plat and field notes of their survey attached thereto.

12. In all cases where a survey of any portion of the lands embraced in an entry made under this act is required, the register will, in addition to publishing and posting the usual final-proof notices, keep a copy of the final-proof notice, with a copy of the field notes and the plat of such survey attached, posted in his office during the period of publication, and the entryman must keep a copy of the final-proof notice and a copy of the plat of his survey prominently posted on the lands platted during the entire period of publication of notice of intention to submit final proof, and at the same time his final proof is offered he must file an affidavit showing the date on which the copies of the notice and plat were posted on the land and that they remained so posted during such period, giving dates.

13. Section 1 of the said act of June 11, 1906, having been amended by the act of May 30, 1908 (35 Stat., 554), the only counties in southern California in which entries thereunder can not be made are San Luis Obispo and Santa Barbara, to which counties the act of June 11, 1906, does not apply. Entries made of lands in the Black Hills National Forest can be made only under the terms and upon the conditions prescribed in sections 3 and 4 of the act of June 11, 1906, as amended by the act of February 8, 1907 (34 Stat., 883).

14. This act does not authorize any settlements within forest reserves except upon lands which have been listed, and then only in the manner mentioned above, and all persons who attempt to make any unauthorized settlement within such reserves will be considered trespassers and treated accordingly.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,

Secretary.

APPENDIX A.

AN ACT To provide for the entry of agricultural lands within forest reserves.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not

needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: *Provided*, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: *Provided further*, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

SEC. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

SEC. 3. That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

SEC. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington counties in

South Dakota except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions of this act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture therein occupied or claimed by them prior to the said date, and all homestead entries under this act in said counties in said reserve shall be described by metes and bounds survey.

SEC. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been open to settlement as provided in this act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

Approved, June 11, 1906.—(34 Stat., 233.)

AN ACT Excepting certain lands in Pennington County, South Dakota, from the operation of the provisions of section four of an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following described townships in the Black Hills Forest Reserve, in Pennington County, South Dakota, to wit: Townships one north, one east; two north, one east; one north, two east; two north, two east; one south, one east; two south, one east; one south, two east; and two south, two east, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said townships to remain subject to all other provisions of said Act.

Approved, February 8, 1907.—(34 Stat., 883.)

AN ACT To amend an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six, be amended by striking out of section one the following words: "Except the following counties in the State of California: Inyo, Tulare, Kern, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego."

Approved, May 30, 1908.—(35 Stat., 554.)

APPENDIX B.

REGULATIONS GOVERNING APPLICATIONS UNDER THE ACT OF JUNE 11, 1906.

U. S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE.

1. All applications for the listing of lands under the act of June 11, 1906, must be signed by the person who desires to make entry, and must be mailed to the district forester for the district in which the land is located.

2. The person upon whose application the land is listed has the preference right of entry, unless there was a settler on the land prior to January 1, 1906, in which event the settler has the preference right.

3. Persons having preference rights under the act may file their entries at any time within sixty days after the filing of the list in the local land office. If they do not make entry within that time, the land will be subject to entry by the first qualified person to make application at the local land office.

4. All applications must give the name of the national forest and describe the land by legal subdivisions, section, township, and range, if surveyed, and if not surveyed, by reference to natural objects, streams, or improvements, with sufficient accuracy to identify it.

5. Section 2 of the act gives, within national forests only, an additional homestead right of entry upon lands chiefly valuable for agriculture, to settlers prior to January 1, 1906, who have already exercised or lost their homestead privilege, but who are otherwise competent to enter under the homestead laws. The general act of February 8, 1908, provides that any person who, prior to February 8, 1908, made entry under the homestead laws, but for any cause has lost, forfeited, or abandoned his entry, shall be entitled to the benefits of the homestead law as though such former entry had not been made, except when the entry was canceled for fraud or was relinquished for a valuable consideration.

6. The fact that an applicant has settled upon land will not influence the decision with respect to its agricultural character. Settlers must not expect to include valuable timber land in their entries. Settlement made after January 1, 1906, and in advance of opening by the Secretary of the Interior, is not authorized by the act, will confer no rights, and will be trespass.

7. Entry under the act is within the jurisdiction of the Secretary of the Interior, who will determine preference rights of applicants.

8. Applicants who appear to have a preference right under the act of June 11, 1906, will be permitted to occupy so much of the land applied for by them as, in the opinion of the forest supervisor, is chiefly valuable for agriculture.

RECLAMATION--WITHDRAWAL--CONTEST.

FAIRCHILD *v.* EBY.

Directions given for the amendment of paragraphs 6 and 7 of the regulations of June 6, 1905, authorizing contests of entries embracing lands within withdrawals under the reclamation act and defining the rights of successful contestants with respect to such lands.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, December 28, 1908.* (J. E. W.)

This case involves the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 32, T. 2 N., R. 1 E., Boise land district, Idaho.

On November 19, 1902, Leander Spangler made desert land entry for the land involved, as well as the W. $\frac{1}{2}$ of the same section.

On May 6, 1904, this land, together with other lands, was withdrawn from entry, under the first form, for reservoir purposes, under the act of June 17, 1902 (32 Stat., 388).

On August 19, 1907, Daniel A. Eby filed a contest against said Spangler's desert land entry, charging non-compliance with the law. This contest was entertained by the local land office and on January 14, 1908, said Eby was notified of the cancellation of the entry and, erroneously, that he had 30 days' preference right within which to file on said land. On February 9, 1908, Eby appeared at the local office for the purpose of making entry and was informed that by reason of withdrawal on May 6, 1904, the land was not available for entry.

On March 2, 1908, said section 32, together with other land, was restored to entry under the second form, in compliance with an order of the General Land Office dated February 26, 1908.

On March 30, 1908, Sherman D. Fairchild, the appellant in this case, having ascertained from the township plats on file in the local land office at Boise, Idaho, that the land in question had been restored to entry, filed application for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of section 32.

On April 13, 1908, said Eby again applied to enter the land in question, but was informed that the same had been entered by Sherman D. Fairchild. The local officers, by letter of April 14, 1908, notified said Fairchild that his entry had been improperly allowed in so far as it covered the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section 32, as a preference right of entry to said land was outstanding in favor of Daniel A. Eby.

Under date of June 13, 1908, your office affirmed the decision of the local officers and held that, while Fairchild had acted in good faith in presenting his application, said Eby had an equitable right of entry upon proper notice from you, and that Fairchild's good faith could not be recognized as an inhibition of the exercise by Eby of his preference right.

The case is now before this Department on appeal filed by Sherman D. Fairchild, which contends that the contest should not have been entertained in the first instance because said land is within a Government reserve, and that even if any preference right ever existed in favor of Daniel A. Eby by reason of his contest, it was for thirty days next after notice to him after the cancellation of Spangler's entry.

The contention of Fairchild that the contest should not have been allowed would be tenable but for the regulations of the Department of June 6, 1905 (33 L. D., 607), the sixth section of which expressly provides for the allowance of contests against any entry covered by a withdrawal for reclamation purposes, whether the withdrawal is of lands for use in the construction and operation of reclamation works, or of lands susceptible of irrigation from such works.

Where a contest is filed under said rule against an entry which is covered by a withdrawal for use by the government, the seventh section of said regulations provides that the lands can not be appropriated by a successful contestant so long as the land remains withdrawn, "but any contestant who gains a preferred right to enter such lands may exercise that right at any time within thirty days from notice that the lands involved have been released from such withdrawal and made subject to entry."

It was thus contemplated that the preference right allowed by the sixth section should remain suspended, if the land was not subject to entry at the date of the cancellation, but that the preference right so acquired might be exercised whenever the land was restored. Whether a contest challenging the validity of an entry should or should not be allowed is a matter resting within executive jurisdiction, but when it has been allowed and in pursuance thereof the entry has been canceled as the result of such contest, the right of the successful contestant to a preference right of entry of such land whenever it is restored to entry is a legal right given by the statute, and can not be controlled by executive discretion.

It follows that after the land has become subject to entry, Eby was entitled to the usual notice provided by the statute of his preference right to make entry of the land within the statutory period. As such notice was not given, the entry of Fairchild was improperly allowed and must be canceled.

But for the express provision in section 6 of said regulations, Eby could not have acquired a preference right of entry, for the reason that at the date of the filing of his contest the land had been appropriated by the government for contemplated use in the construction and operation of irrigation works, and every one, in the absence of such rule, would be put upon notice that he could not acquire a right to enter the land upon the cancellation of the entry.

A regulation that contemplates the acquisition of legal rights that must be suspended indefinitely can only result in great confusion in the disposal of the public lands, and ought not to have been made and should not be continued. Such is the apparent result of the right conferred by the sixth and seventh regulations of June 6, 1905, and it is believed that the interest of the government, as well as the general public, will be subserved by their revocation. In the future no contest will be allowed against any entry of land that has been appropriated by the government, and in all cases where a contest has been allowed before such appropriation, the withdrawal of the land for use by the government before the termination of the contest, or an entry by the successful contestant, will *ipso facto* terminate all right that was acquired by reason of such contest.

A contest should be allowed against any entry of lands susceptible of irrigation from any government irrigation works, either before

or after the withdrawal of such lands, but if the lands shall have been withdrawn before the successful contestant enters, his entry will be subject to the limitations and conditions of the reclamation act.

It is therefore directed that sections 6 and 7 of the regulations of June 6, 1905, be amended accordingly. [See below.]

Your decision is affirmed.

RECLAMATION—CONTESTS OF LANDS WITHDRAWN.

REGULATIONS.

DEPARTMENT OF THE INTERIOR;

GENERAL LAND OFFICE,

Washington, D. C., January 19, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: The provisions of paragraphs 6 and 7 of the regulations concerning lands withdrawn under the reclamation act of June 17, 1902 (32 Stat., 388), approved June 6, 1905 (33 L. D., 607), are hereby amended to read as follows:

6th. No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where a contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest.

7th. Any entry of land embraced within the area of a second form withdrawal may be contested and, if at the date of entry by the successful contestant, the land is under second form withdrawal, his entry will be subject to the limitations and conditions of the reclamation act.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD,

Secretary.

MINING CLAIM—ENTRY—DEFECTIVE NOTICE.

JUNO AND OTHER LODE CLAIMS.

A mineral entry based upon an essentially defective notice is unauthorized and must be canceled; nor can that entry be validated and sustained by a republication and reposting of notice of the patent application, but entry must thereafter be made anew to afford a lawful basis for a patent.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, December 28, 1908.* (E. B. C.)

The Union Bank and Trust Company, of Helena, Montana, claiming as transferee of the applicant company mentioned below, has

appealed from your office decision of March 4, 1908, adhered to on review April 7, 1908, wherein there was denied the former company's request for authority to repost and republish the notice of the application for patent in the matter of entry No. 462, made December 30, 1897, by the American Developing and Mining Company for the Juno and ten other lode mining claims, survey No. 1125, Hailey, Idaho, land district.

The record shows that the American Developing and Mining Company filed its application for patent April 9, 1895, and that the published notice of such application first appeared April 17, 1895.

In the approved survey the corners of the various claims are numbered in single series from corner No. 1 of the Ironstone North claim to corner No. 52 of the Juno Extension location. In the published notice corner No. 1 is connected by a stated course and distance with United States mineral monument No. 2. The descriptive portion of the notice begins as follows:

Beginning at corner No. 1 of survey No. 1125 Ironstone North lode from which the U. S. M. M. No. 2 bears south 44 degrees 23 minutes west 521.6 feet, thence south 1 degree 35 minutes east 560.5 feet, thence south 2 degrees 26 minutes east 940 feet, thence north 87 degrees 48 minutes west 590 feet, thence north 3 degrees 10 minutes west 644 feet, thence north 3 degrees 23 minutes east 865.4 feet, thence south 87 degrees 48 minutes east 519.8 feet.

Ironstone South lode, from corner No. 7 which is also corner No. 5 of Ironstone North lode, thence—

continuing around the claim, but no other corners are mentioned or described. Similarly corner No. 17 of the Ironstone Extension claim is identified with corner No. 11 of the Ironstone South; corner No. 25 of the Hindoo as corner No. 13 of the Ironstone Extension; and corner No. 30 of the Beauty South as corner No. 23 of the Hindoo.

The description of the Coarse Gold lode claim starts "from corner No. 18," which corner is not otherwise identified or located. The Holyhead location description begins "from corner No. 14, survey No. 748A, thence," etc., which corner is not otherwise mentioned or particularly described.

The Holyhead No. 2, the Beauty North, the Juno Extension, and the Juno lode claims are consecutively connected by certain mentioned common corners to said corner No. 14, survey No. 748A.

A draftsman, with this notice before him, could plat the Ironstone North claim in its proper position relative to the mineral monument from the data therein given, but no other claim of the group could with reasonable certainty be so platted or located in relation to the mineral monument or to other claims mentioned from the information contained in the notice. This notice also shows that the claims are upon unsurveyed lands in the Dahlenega mining district, in the county of Lemhi, State of Idaho, and that the adjoining claimants are

Charles J. Barclay and the American Developing and Mining Company, but these further facts add nothing to the certainty or definiteness of the descriptions given.

May 4, 1898, your office held the notice to be defective, particularly as to the Coarse Gold and the Holyhead claims and the four claims consecutively connected to the latter, because those claims were not tied to the mineral monument, and directed that the notice of application be republished in strict compliance with the requirements of the mining regulations, as was then the practice.

Republication of the notice, so amended as definitely to fix and identify the locus of the several claims, was made, commencing January 25, 1899, and proof thereof and of contemporaneous reposting in the local office was furnished, but there was no evidence produced which showed that the notice and plat had been reposted upon the land. Numerous calls were made, but such proof was not produced. Finally, June 25, 1906, evidence of service of your office requirements being shown and no action having been taken, the entry was held for cancellation and the local officers were instructed so to advise the claimant.

September 4, 1907, the treasurer of the trust company made inquiry as to securing "duplicate patents" for the claims, and was advised that the entry had been held for cancellation for failure to furnish certain required proofs. September 26, 1907, the trust company requested an extension of time in which to supply the called-for evidence. October 30, 1907, your office declined to extend time for appeal, but stated that the case would not be closed for sixty days and that any evidence received would be considered under rule 100 of practice.

February 25, 1908, resident counsel filed an affidavit, executed by the president of the company, to the effect that the required proof could not be furnished, for the reason that, of the parties who were supposed to have reposted the notice on the land, one was dead and the other was in the State of Nevada and professed to have no definite recollection as to the fact of reposting. Permission was requested to repost and republish the notice anew, and thereafter furnish the proper proofs thereof, in support of the entry first above mentioned.

March 4, 1908, your office, treating the request as a motion for review and reconsideration, denied the same under the ruling in the case of Mojave Mining and Milling Company v. Karma Mining Company (34 L. D., 583).

The company filed a motion for review, which was denied, and the pending appeal followed.

The appellant contends in effect that the case cited is not in point, and that the defect in the original notice as published is not a juris-

dictional matter and does not render the entry so defective as to be incurable.

In the case of *Henry Wax et al.* (29 L. D., 592), the Department held that a published notice of application for mineral patent which shows no connection with a mineral monument or a corner of the public survey is fatally defective.

In the case of the *Southern Cross Gold Mining Company v. Sexton et al.* (31 L. D., 415), in which the original notice (1885) failed to give any connection line and was adjudged by your office (1895) to be insufficient and a new notice was required, and in which the facts are quite similar to those in the case at bar, the Department (in 1901) said:

The original notice of the application for patent was fatally defective and formed no legal basis for the entry made upon it. When this condition was found to exist the regular course would have been to have canceled the entry before allowing new notice to be given. The case was not one of mere irregularity, or one which presented defects that might be cured by supplemental proceedings irrespective of any claim or contention by other persons, and the entry suspended until the supplemental proceedings could be had. The original notice being fatally defective, it was rejected for that reason. Under the law, when the notice fell the entry fell also. It no longer had any basis to support it. It must be treated, therefore, as though it had been canceled of record at the time the notice was finally adjudicated to be insufficient. The adjudication of the insufficiency of the notice was equivalent to a determination that the entry had been erroneously allowed and should be canceled. There can be no valid entry upon an application for patent to a mining claim until notice of the application shall have been lawfully given.

The Department having the same case again before it, April 22, 1902 (unreported), reiterated the above holding and expressly directed your office "to formally cancel said entry of record." New notice had been published, commencing December 14, 1900.

The decision of the Department was sharply criticised by the Supreme Court of California, as to its retroactive features, in an adverse suit arising under the republished notice, where plaintiff's locations had been made before the rendition of the departmental decision and before the entry certificate was actually canceled. See case of same title (82 Pac., 423). The views expressed by the Supreme Court but serve to emphasize the weakness and attendant mischief of the former practice in failing to cancel the entry and in authorizing republication and reposting, in support of the entry already of record.

Again, in the case of *Reed v. Bowron* (32 L. D., 383), in which the notice failed to describe the mill site applied for in connection with the lode claim, the Department held (syllabus):

The notice of an application for patent to a mining claim published in a newspaper, in accordance with the requirements of section 2325 of the Revised

Statutes, should substantially conform to the notice as posted upon the claim, and should contain sufficient correct data to put persons of ordinary intelligence and prudence interested in the land applied for upon inquiry, and "to enable any one interested to ascertain with accuracy the position of the claim."

In that case, the notice being found defective as to the mill site, the entry to that extent was declared to be improperly allowed and ordered to be canceled.

From the foregoing authorities it follows that an entry based upon an essentially defective notice is unauthorized and must be canceled. This conclusion is in entire harmony with, and in principle closely allied to, those decisions which hold that an entry must be canceled where the requisite statutory expenditure is not shown, *Highland Marie and Manilla Lode Mining Claims* (31 L. D., 37); *Tough Nut No. 2, etc.* (36 L. D., 9); or where the application for patent or the affidavits as to posting on the land are defective in substance or are not properly verified, *Mojave Mining and Milling Co. v. Karma Mining Co.* (34 L. D., 583); *El Paso Brick Co.* (37 L. D., 155), and authorities therein cited.

In the case at bar the Department is clearly of the opinion that the original notice as published, save as to the description of the Ironstone North lode claim, is so defective and uncertain in essential matters of description and in failing to designate with substantial accuracy the locus of the claims upon the ground as to render it fatally defective. See the case of *Hallett and Hamburg Lodes* (27 L. D., 104).

The entry must accordingly be canceled as to all the claims except the Ironstone North lode, as to which location it may, in the absence of other objections, be sustained and passed to patent in due course.

The conclusions reached by your office, as hereinabove modified, are affirmed.

DESERT LAND ENTRY—ENLARGEMENT OF ORIGINAL ENTRY—INSTRUCTIONS OF JULY 26, 1907.

CHARLES C. WILSON.

The instructions of July 26, 1907, to the effect that where a desert land entryman can not at the date of his entry take the full quantity of land allowed by law, because of entries or filings covering the adjacent lands, but at that time clearly indicates his desire and intention to take certain of such lands, and immediately takes steps which result in clearing the record as to the tracts desired, he may thereupon be permitted to enlarge his entry by including such tracts to the extent of the full area allowed by law, contemplate that the proceeding to clear the record as to desired adjacent lands shall be initiated promptly, and can not be invoked where there is any considerable delay in taking the initiatory steps with a view to clearing the record.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, December 28, 1908.* (J. F. T.)

January 29, 1906, Charles C. Wilson made desert land entry number 4160 for lots 1, 2 and 3, Sec. 15, T. 4 N., R. 37 E., containing 89.02 acres, Blackfoot, Idaho, land district.

November 8, 1907, he filed his application for the amendment of his entry, to include therein the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 15, lot 4, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, same township and range.

By your decision of June 26, 1908, you have rejected his said application to amend, and Wilson has appealed to the Department.

Your decision is based upon departmental instructions of July 26, 1907 (36 L. D., 44).

It appears that the land Wilson now seeks to include in his entry was, at the date of his entry, embraced in the homestead entry of one Robert Berret, and that Berret's entry was canceled by your office letter "H" of October 22, 1907, as the result of the contest of one Robert Knox, initiated April 9, 1906.

Your decision seems to find all other material facts in favor of this applicant and to reject his application solely upon the ground that the contest by which the land he seeks was made clear of record and subject to entry was not presented in his name as contestant.

It is noticed that the instructions upon which your action of rejection is based were issued after date of Wilson's entry and the initiation of the contest to clear the record of the adjacent land now sought.

Appellant's allegations and contentions as to this matter are as follows:

At the time this entry was made the condition of the surrounding contiguous lands was well known to this affiant. He knew that the provisions of the law were being violated and for that reason determined to contest H. E. 9448 made by Robert Berret and after securing the cancellation of the said entry make an application to amend his desert entry and thus secure in the entry as amended sufficient land to make the tract valuable.

At the time this entry was made Robert Knox was in the employ of this affiant and did on the 9th day of April, 1906, file a contest against the Berret homestead entry. He did it for and in the interests of this appellant because any person has the inalienable right to file a contest in public land cases when the law governing has been and is being violated.

There were reasons that made it more desirable that the contest should be filed by Knox than by any other person and at the time there was no rule, regulation, or decisions, that held that the one who desired to amend an existing entry should be the complainant in order to become the beneficiary.

It had been held in the cases cited in the instructions hereinbefore referred to differently. Numerous cases identical with this one have been allowed in this district and were referred to and cited as authority to this appellant by his attorney.

We hold that the Hon. Commissioner would be absolutely correct in his contention if this entry, the contest referred to, and all the original proceedings, were

made, initiated and began subsequent to the issuance of the instructions of the Hon. Acting Secretary dated July 26, 1907 (36 L. D., 44).

However, inasmuch as the entry was made in January, 1906, and the contest was filed as soon thereafter as arrangements could be made, April, 1906, and the instructions under which the application was made did not issue until fifteen months thereafter, the application was improperly disallowed.

Apart from the fact that the contest against Berret's entry was not brought and conducted in the name of the applicant, it does not appear that any action was taken by anyone to clear the record of the entry then covering the tract now sought to be entered until more than two months from the date of his original entry.

The Department is therefore of the opinion that the bringing of such contest does not follow sufficiently close upon the making of the original entry to satisfy the requirements of the instructions of July 26, 1907 (36 L. D., 44), which require that appropriate steps to clear the record as to a particular tract of desired adjacent land be immediately taken by an entryman who intends to add same to his original entry.

Your decision is therefore affirmed.

MINING CLAIM-IMPROVEMENT-LIME-KILN.

SCHIRM-CAREY AND OTHER PLACERS.

A lime-kiln erected on a placer mining claim containing a deposit of limestone, for the purpose of reducing the limestone quarried therefrom to lime, can not be accepted as an improvement within the meaning of the statute requiring an expenditure in labor or improvements of the value of \$500 as a condition to obtaining patent.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, December, 29, 1908.* (E. P.)

Under date of October 29, 1907, the Grand Canyon Lime & Cement Company made entry No. 373, for the Schirm-Carey Nos. 1 to 9, inclusive, and the Grand Canyon Nos. 1 to 11, inclusive, placer mining claims, making twenty in all, embracing in mineral survey No. 2234, and situated in the Phoenix, Arizona, land district.

The gross area embraced within the confines of the group is given as 2834.46 acres, throughout nearly the entire length of which (about four miles) the right of way of what was originally the Atlantic & Pacific railroad, 200 feet in width, pursues a somewhat sinuous course. The area commonly embraced within the right of way and the exterior boundaries of the group is computed at about 107.33 acres. While the several location notices are silent on the subject, the area in conflict was expressly excluded in the mineral patent proceedings, the net area entered as above being 2727.13 acres.

The claims are alleged to be located upon an extensive deposit of limestone, the improvements (which are certified by the surveyor-general upon the face of the official plat to consist of a quarry, six lime-kilns and 52,880 feet of road—value \$46,680), are returned in the mineral surveyor's field notes as a limestone quarry upon the Schirm-Carey No. 1 Placer, valued at \$10,000; six lime-kilns on the same claim, valued at \$5,000 each; wagon roads over portions of the group, valued at \$5,680; lime-bin, cistern and buildings, not valued. A further certificate of the surveyor-general, attached to the transcript of the field notes, includes only the six lime-kilns (valued at \$30,000), and assigns as a credit in support of the entry one-twentieth of the value thereof, or \$1,500, to each claim of the group.

In due course of examination, and by decision of February 5, 1908, your office noted the difference between the two certificates of the surveyor-general, and particularly observed that in the certificate last above mentioned the value of the lime-kilns only had been commonly applied to the group; and it was held, in substance and effect, that at most the lime-kilns could be accepted as a credit for the benefit of the claim alone upon which they are situated, and upon which the only excavation or quarry (above mentioned) appeared to exist, since their employment could only relate to the reduction of limestone therefrom; that, on the other hand, there would seem to be no essential difference between the lime-kilns as offered improvements under the statute and the stamp mill rejected by the Department in the case of Monster Lode Mining Claim (35 L. D., 493), it being—

equally clear that the operation of the kilns themselves have absolutely nothing to do with the excavation of the material—the real development of the mine—any more than if it were situated entirely outside of the limits of the property developed, as undoubtedly they are in many cases;

that naturally, the expenditure represented in the excavation or quarry upon the Schirm-Carey No. 1 Placer should be accredited to that claim alone (citing the case of Elmer F. Cassel, 32 L. D., 85); that as it is not satisfactorily shown that the above-mentioned roads, or portions of the road within the group, tend in any way to the development of the mineral in the claims they traverse, they can not be taken into account (citing the Douglas case, 34 L. D., 556); that, apart from other objections, the pending entry could not be approved and passed to patent as it stands, exclusive of the railroad right of way, which, "being an easement only," affords no justification for the exclusion; and that if the entry might be in other respects eventually perfected, supplemental patent proceedings to embrace the area or strip in question would yet be necessary before patent could issue. From this decision, the entry company appeals to the Department.

In the case of Highland Marie and Manilla Mining Claims (31 L. D., 37), it is held that a stamp mill situated off a claim for which application for patent had been made, even if constructed or purchased by the applicant for the express purpose of crushing ores from that claim, could not be accepted as an improvement made for the benefit thereof, within the meaning and intent of the statute. In that decision it was said (page 38):

The Department is not aware of any instance in which such a mill so situated has ever been held, either by the land department or by the courts, to be properly credited as an improvement for the benefit of a mining claim in contemplation of the mining laws. Under the decisions of the courts and the land department, labor or improvements to be so accredited must actually promote, or directly tend to promote, the extraction of mineral from the land, or forward or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works thereon, or pertaining thereto. (*Smelting Co. v. Kemp*, 104, U. S., 636, 655; *Book v. Justice M. Co.*, 58 Fed. Rep., 106, 117; *U. S. v. Iron Silver Mining Co.*, 24 Fed. Rep., 568; *Lockhart v. Rollins* (Idaho), 21 Pac. Rep., 413; *Doherty v. Morris* (Colo.), 28 Pac. Rep., 85; *Copper Glance Lode*, 29 L. D., 542; and *Zephyr and Other Lode Mining Claims*, 30 L. D., 510, 513).

And in the case of Monster Lode Mining Claim (35 L. D., 493), the Department applied the same rule to a like improvement situated upon the claim sought to be patented, saying:

A stamp mill erected upon a mining claim may be of benefit to the owner of the claim, but it in no way directly facilitates the extraction of mineral therefrom, or contributes to its development as a mine. Whilst it may be of advantage to have a stamp mill upon the claim, and thus save a long haul of the ore extracted therefrom, yet such a mill is not an active agency in the actual development of the mine; and the relation in that respect is precisely the same, whether the mill be situated upon the claim or at some distance therefrom. The only purpose which the mill can serve is in treating the mineral-bearing rock after it has been mined from the claim. A stamp mill has no connection with the operation of extracting mineral from the ground, but its function begins only when the process of mining has ceased.

There is no distinction, so far as their respective relations to actual mining operations are concerned, between a stamp mill erected upon a mining claim for the purpose of crushing and treating the ore mined therefrom, and a lime-kiln erected on a claim containing a deposit of limestone, for the purpose of reducing its product from one chemical compound to another. Therefore, for the reasons stated in the decisions above cited, it must be held that the lime-kilns here sought to be accredited as improvements upon or for the benefit of the twenty claims in controversy cannot be accepted as meeting the requirements of the statute, with regard to any of the claims of the group.

As to the roadways referred to in the return of the mineral surveyor, it is nowhere made to appear that they have any connection

whatever with actual mining operations conducted upon any of the claims of the group. In the absence of such a showing, no portion of the value of such roads is entitled to be accredited to any of the said claims.

The only other improvement referred to by the mineral surveyor in his return, and whose value is given, is the \$10,000 excavation situated upon the Schirm-Carey No. 1 claim. This improvement, while of unquestioned benefit to the individual claim upon which it is situated, does not, however, so far as is shown, tend in the slightest degree to the development of any of the other claims of the group. In the case of Elmer F. Cassel (32 L. D., 85), it is held (syllabus) that:

An excavation made upon one of a group of placer mining claims containing a deposit or formation of marble so near the surface as to be most advantageously moved by means of quarries, and which manifestly does not tend to facilitate the extraction of the marble from the other claims of the group, or to promote their development, is not such an improvement as may be accepted in satisfaction of the statute requiring an expenditure of \$500 in labor or improvements upon, or for the benefit of, each of the claims constituting the groups, as a condition to obtaining patent therefor.

The excavation here in question falls clearly within the rule; and hence must be rejected as to all of the claims of the group save the one upon which it is actually situated.

Eliminating the value of the lime-kilns and the wagon-roads from consideration in connection with any of the claims here in question, and the value of the \$10,000 excavation from consideration in connection with any but the Schirm-Carey No. 1 Claim, upon which that improvement is situated, it is clear that the showing made fails to establish a compliance with the requirements of the statute in the matter of improvements with respect to any of the claims embraced in the entry except the one last mentioned. In the absence, therefore, of an additional or supplemental showing satisfactory in this regard, the entry as to all the claims of the group save the Schirm-Carey No. 1 must be cancelled.

The difficulties and perplexities involved in the various aspects of the case, in view of the practice with respect to the disposition of lands in a similar situation under other public land laws, as well as the serious question involved in the bisection of the claim by reason of the exclusion of the railroad right of way, is deemed by the Department to justify the conclusion reached by your office, that in no event can the entry as to any of the claims be passed to patent in the absence of supplemental patent proceedings including the previously excluded area constituting the railroad right of way.

The judgment appealed from is accordingly affirmed.

SWAMP LAND GRANT—ADJUSTMENT—SKETCH MAPS OF SURVEYS.

STATE OF MINNESOTA.

While sketch maps returned with the field notes of survey may be properly considered in connection with the field notes in determining whether or not the lands are swamp and overflowed under the rules adopted for the adjustment of the swamp land grant to the State of Minnesota, such maps, standing alone, can not be considered of special importance in determining that question.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, December 29, 1908.* (G. B. G.)

This is an appeal on behalf of the State of Minnesota from your office decision of July 3, 1908, holding for rejection the claim of the State under its swamp-land grant (12 Stat., 3), to the following tracts of land in the Duluth land district:

In T. 63 N., R. 21 W., the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 17; the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20; the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 27.

In T. 63 N., R. 22 W., lot 4, Sec. 7; the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 17; the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{2}$, Sec. 18; the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 20; the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 23; the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24; the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27; lot 2, Sec. 33; the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and lot 3, Sec. 34.

The conclusion that these described tracts of land were not swamp lands within the meaning of the act of March 12, 1860, making the said grant, was reached by your office after an examination of that question under the rules of adjustment adopted by this Department November 21, 1850 (1 Lester, 543), and that laid down, as supplemental thereto, in the case of the State of Minnesota, November 26, 1906 (35 L. D., 326). It is admitted that a strict application of these rules of adjustment justifies the decision reached by your office, but it is contended that according to the sketch maps returned by the surveyor in the field, the greater part of each forty-acre subdivision involved is shown to be swamp, and that a larger meaning and more forceful interpretation should be given these sketch maps than has been accorded them in your said office decision.

In the case of the State of Minnesota (32 L. D., 65), it was pointed out that under the swamp land grant to that State the duty of identifying or determining what lands were at the date of the grant swampy or overflowed in character, and therefore granted to the State, rested, in its last analysis, upon the Secretary of the Interior. Different methods of adjustment were fully weighed and it was suggested that any method of ascertaining what lands pass under this grant would be attended with difficulty in its execution; that the usual differences of opinion of those who have had observation of the land, the difference in the condition of the lands at different

seasons of the year, the uninhabited condition of the country at the date of the grant, the changes that have occurred by reason of settlement and improvement of the country, the reduction of timber areas, and the improvements in drainage, all tend to make an absolutely perfect identification of the lands which were swamp in 1860 impossible, and to so far burden with expense the matter of their identification as to render impracticable if not to preclude resort to some methods of identification. It was said that, in evident anticipation of these difficulties and with a view to the selection of the best and most practicable plan, but not to obligate himself or his successors by an agreement partaking of the nature of a contract, the Secretary of the Interior, through the Commissioner of the General Land Office, submitted to the several States two methods of identifying the swamp lands and suggested as the most practicable method that of identifying them by the field notes of the public surveys; that the State of Minnesota assented to this plan of adjustment, not by way of contract but because the Secretary of the Interior, Commissioner of the General Land Office, the governor of the State, and the legislature of the State, concurred in the opinion that it was the best and most suitable method; that they agreed upon it in the sense that they all concurred in the view that it was the best thing to do, and that this plan of adjustment was uniformly followed for a quarter of a century, and during that time operated quite generally to the satisfaction of the United States and the State.

It was also pointed out that a subsequent departure from that rule under a plan of identifying swamp land of that State by examination by agents in the field and by protests and hearings in the land department, had been shown to be "cumbersome, expensive, slow, litigious and generally unsatisfactory," and therefore it was determined to return to the original plan agreed upon, to wit, an adjustment upon the field notes of survey. To this end it was directed:

The best energies of the proper divisions of your office should be directed to obtaining such accurate surveys and notations of the character of the lands which may be hereafter surveyed in this State as will obviate the existing cause of contest and controversy.

It was also further directed that your office put all surveys in the hands of capable and honest surveyors, to exact from them a "faithful and efficient performance of their duty, including a faithful and accurate notation of the swampy or non-swampy character of the lands surveyed," and in accordance with this direction your office issued special instructions to all deputies surveying in Minnesota, in part as follows:

You must note in your field-notes the exact distance at which you enter or leave swamps, marshes or overflowed lands, or lands that are "wet and unfit

for cultivation," and the course of the line bordering said lands and in your notation of said lands, you will state that they are "subject to overflow," or are "wet and unfit for cultivation." You will also, as far as possible from careful observation made while running the township and section lines, and according to your best judgment, *give in the diagram* to be returned with your field-notes the *outline and extent of all such swamp or overflowed lands in order that the rights of the State to the swamp lands may be properly adjusted.*

In the matter of certain lands claimed to be swamp and overflowed lands by the State of Minnesota, which had been surveyed under these instructions, the State appealed from a decision of your office rejecting its claim, under the swamp land grant, to said lands. Upon that appeal it was urged that the returns which constituted the field notes in these townships show more in relation to the character of the land involved than "the intersections of the lines of swamp and overflowed lands with those of the public surveys," which was the basis of the rule in 1 Lester, 543; that said rule was inapplicable, and further that as to the lands there in question the survey shows intersections of the lines of swamp and overflow therewith upon one side of the section only, thus rendering the rule impossible of application. The force of these contentions was admitted and it was said in a decision of the Department, November 26, 1907, in the case of State of Minnesota (35 L. D., 326), that in such instances there would seem to be no good reason why the land department might not look to a surveyor's returns for such proof of the character of the land as might be found therein; that it was undoubtedly true, as contended, "that in many instances the surveyor's return shows intersections of swamp and overflowed lands upon one side of a section only and it is absurd to say that the character of such lands must be determined only by connecting intersections with a straight line where such line when drawn would be the same as the section line and therefore show nothing." It was pointed out that the surveys there in question were made under the instructions above quoted and that in accordance therewith the surveyor's return included a diagram which purports to give "the outline and extent of all such swamp and overflowed lands."

These considerations induced the Department at that time to modify the existing rule with reference to the facts evidenced by the field notes of survey and in the last-named decision it was said:

While the Department is not disposed to modify the rule in 1 Lester, when capable of application, yet in view of the foregoing considerations, it is thought such rule should be supplemented, and it is directed, in instances where sketch maps have been returned, with surveys in the field, and the field-notes of survey show intersections of swamp and overflowed lands with *one* line of a section only, that these sketch maps be taken into consideration in determining the character of the portion of the section lying upon the surveyed line with reference to its swampy or non-swampy character, and in such instances, where

the outline of the swamp or overflowed lands is shown by the diagram to extend from the section line fifteen chains or more within the section, the adjustment will be made upon the basis of the relative portions of the surveyed line shown to be swamp or dry by the field-notes of survey. That is, if the diagram shows that the swamp or overflow thereby represented extends at any point fifteen chains or more across the section line, and within the section, the State will be entitled to such forty-acre subdivisions lying upon the section line as are shown by the field-notes of the major portion of said line to be of the character granted, but this rule shall have no application in the adjustment of a claim to the *interior* forty-acre subdivisions of a section.

This somewhat lengthy recital of the evolution of the existing rule of adjustment of the swamp land grant to the State of Minnesota shows that it has been a vexatious question and has not been determined except after most careful deliberation. But the effect of appellant's contention is that the rule of adjustment should be further extended; in other words, that where lands may not be adjudged to be swamp under either the rule in 1 Lester, or the modified rule, as herein above recited, that the rule should be extended to include lands which are shown to be swamp only by the sketch maps accompanying the surveyor's returns. This contention is thought to be unreasonable and will not be granted. A further modification or extension of the rule of adjustment for the identification of these lands would not seem to be necessary. The Department has never believed and no reasonable construction that might be placed on its language heretofore used with reference to this question can be said to make it express the idea that these sketch maps, standing alone, were regarded as of any particular importance in determining this question. It is only when they might be used as an aid in connection with the field notes of survey that it was thought they might be used properly or to advantage. It is undoubtedly true that under the existing rule of adjustment the State will lose some lands that are swamp, but it is also true that it will get some lands which are not swamp. Such consequences must necessarily result from any arbitrary rule of adjustment, and this rule is necessarily arbitrary in that it does not contemplate an examination in the field as to the actual character of the land, other than what is shown by the field notes of survey.

It is believed that the advantages to the United States and to the State resulting from the existing rule will equalize themselves, and that there ought not to be good ground for complaint as to its operation. Inasmuch as the lands in controversy are not swamp lands under the existing rule of adjustment the decision appealed from is affirmed.

CONFIRMATION—PROVISO TO SECTION 7 OF THE ACT OF MARCH 3, 1891

JOSEPH PAPILLION.

A direction by the General Land Office to a special agent to investigate a particular entry, followed by an investigation by the special agent and request by him that the entry be suspended to await his report, all within two years after the issuance of the final certificate, will bar confirmation of the entry under the proviso to section 7 of the act of March 3, 1891.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 4, 1909.* (C. J. G.)

An appeal has been filed by Joseph Papillion from the decision of your office of October 10, 1908, sustaining the action of the local officers in holding for cancellation his desert-land entry for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 24, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 25, T. 25 N., R. 1 E., Great Falls, Montana.

The entry was made September 20, 1900, and final certificate issued thereon June 13, 1903. In March, 1902, one Otto Maurer had written to your office stating, on information, that said entry was made for the benefit of other parties, and requesting that a special agent be sent to investigate the same. January 23, 1903, and again on February 4, 1904, your office directed a special agent to investigate said entry. October 8, 1903, the special agent advised your office that he had made investigation of Papillion's entry and asked that action thereon be deferred awaiting his report. No report, however, was submitted by this agent. December 18, 1905, your office advised another agent that protest by Maurer had been filed against this entry, and directed him, if he did not already have said entry on his list, to place the same thereon, and in due course examine the land and make report.

October 6, 1906, your office received report from a special agent dated September 24, 1906, who, in substance, charged failure on the part of Papillion to comply with the desert-land law, and intimated that his entry was made for the benefit of other parties. The agent recommended that the entryman be given opportunity to apply for a hearing to determine the truth of the charges. October 30, 1906, the local officers were directed by your office to notify Papillion of said charges, which they did, and thereupon he applied for a hearing, which was set for March 11, 1908. A motion to dismiss the proceedings was filed by the entryman February 1, 1908, on the ground that there was no pending contest or protest against the validity of his entry within two years after date of final receipt, and that under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099), he was entitled to patent. This motion was denied by your office

February 17, 1908, and the local officers were directed to proceed with the hearing, it being stated:

In view of the facts disclosed by the records in this office, I do not deem claimant's contention that the entry is confirmed well founded. While the allegation of Maurer that he *believed* the entry to be made in the interest of Bannantyne Bros. would not be sufficient to constitute a bar to confirmation, because it was hearsay, yet the fact that Mr. Welch requested the suspension of the entries, this one among them, and stated that he would make a report upon the form for adverse report, does operate as a bar, as it must be conceded that he had memoranda of his findings upon the investigation of the entries and the filing thereof in the office of the Chief of Field Division would bar confirmation.

A hearing was had, there being present a special agent of your office, as well as the entryman and his attorney. The entryman renewed his motion to dismiss, on the ground that all proceedings were barred under the act of March 3, 1891. This motion was overruled by the local officers, and the testimony of the special agent was then taken. Attached to the record also, and submitted as part of the evidence, was the deposition of the agent on whose report of September 24, 1906, the hearing was ordered. The local officers decided that the charges had been sustained and recommended cancellation of the entry. This decision was concurred in by your office, which also found that the entryman's contention that your office had not jurisdiction to order, nor the local officers to hold, the hearing, was without merit, reference being made to the case of John N. Dickerson (33 L. D., 498), wherein it was held:

A proceeding by the government to determine the validity of an entry is commenced when the investigation is ordered, and if so commenced before the lapse of two years from the date of the final certificate, it will defeat confirmation of the entry under the proviso to section 7 of the act of March 3, 1891, whether notice of such action is given to the entryman or claimant within that period or not.

It is claimed in the appeal here that the decision in the Dickerson case was overruled in the instructions of July 29, 1907, to Acting Chief of Field Division Neuhausen, which, as it is contended, held that the mere filing and listing of an entry to a special agent for investigation is not such proceeding as will bar operation of the confirmatory act of March 3, 1891. Those instructions involve a large number of cases where entries and proofs were made before United States Commissioner Ware. Report had been received that many entries had been made before said commissioner, a large number of which were undoubtedly fraudulent, and that notices for final proofs were being posted covering many other entries. Directions were accordingly given to suspend such entries pending an investigation. It was impossible at the time to differentiate between entries that were made in good faith and those that were not, so that all entries—whether names were specified or not—made before the commissioner

in question were suspended. Based upon such facts, it was stated in the instructions as follows:

The charge in this case is against United States Commissioner Marie L. Ware, not against any specific entry. . . .

A mere allegation that a large number of entries where the proofs were made before United States Commissioner Ware were fraudulent can not be regarded as a protest against the validity of every entry where the proof was made before that officer. Nobody ever presumed or asserted that every entry with which said commissioner had anything to do was invalid. The charge was only indirectly a suspicion against the validity of the entries not enumerated and in no wise sufficient to constitute a protest against a specific entry upon which issue might be taken and the entryman demand a hearing. It was based solely upon the practice of such United States Commissioner, and did not in any manner refer to the conduct of any particular entryman except those named in the report. The suspension was directed against all entries where the proof was made before that officer, and the mere fact of the listing of some of the entries in directing an investigation by the special agent was not sufficient to constitute a protest against the validity of the entries listed.

The foregoing is distinctly different from a case where a special agent, as in this case, is directed to investigate a particular entry whose validity has been brought into question before the land department. The charge of Otto Maurer, the same being based merely on information, was, perhaps, not sufficient in itself to bar the confirmatory statute. But the directions of your office issued to the special agent to investigate Papillion's entry, and especially the report of the agent asking suspension of said entry, all within two years after final receipt, did in fact constitute such bar. It was held in the case of John S. Maginnis (33 L. D., 306), followed in the case of John N. Dickerson, *supra*, that any proceeding challenging the validity of any particular entry, or any investigation initiated because of the supposed invalidity of such entry, before the lapse of two years from date of final certificate, takes the entry out of the confirmatory operation of the proviso to section 7 of the act of March 3, 1891. In the case of William Gribble and Menasha Wooden Ware Company, in which the Department rendered decision on review June 6, 1908 (not reported), and subsequently involved in petition for writ of mandamus directed to the Secretary of the Interior, the facts were as follows:

Your office had directed a special agent to investigate Gribble's entry, among others. No formal or specific charges were made, and the investigation was ordered by reason of the fact that in several of the claims the same witnesses had been used. To your office this appeared suspicious of fraud and to call for inquiry into the facts. In an opinion rendered by the Supreme Court of the District of Columbia (37 L. D., 329), it was stated and held:

The question then is whether this constituted a contest or a protest. It was not a *contest* in the sense that a special charge had been made, much less that

notice thereof had been given to the claimant, so that it might be met by him. Neither was it a *protest* in the sense that a specific ground had been pointed out for the basis of the protest and the claimant informed thereof. But are either of these necessary? There was a solemn declaration by the Department that the circumstances surrounding the claim were such as to beget suspicion and to call for a thorough investigation, and that in the meantime the patent ought not to be granted. The very purpose of the investigation might be defeated if the claimant must be notified in advance. The investigation resulted, after June 10, 1903, in a report upon which there was a formal suspension of the patent, and the case is still under consideration and undetermined for want of knowledge on the part of the Department of the whereabouts of the claimant who should be served with notice.

As defined by Webster, a protest is "a solemn declaration of opinion, commonly a formal declaration against some act." Is not that exactly what this is? It was the first step in a proceeding calculated to test the validity of the claimant's right to a patent. That step having been taken within two years, the statute of confirmation did not operate upon this claim.

The decision of your office herein is affirmed.

SECOND HOMESTEAD ENTRY—RELINQUISHMENT—ACT OF FEBRUARY 8, 1908.

MORITZ *v.* HINZ (ON REVIEW).

The filing of an unconditional relinquishment operates *eo instanti* to terminate the entry, which is thereafter no obstacle to the making of a second entry by the entryman, notwithstanding it may remain uncanceled of record.

No such right was acquired by a mere application to enter, without settlement or improvements, prior to the act of February 8, 1908, as will overcome the equities of a *bona fide* settler who at the time of such application was maintaining an actual residence and had made valuable improvements upon the land, and who is qualified under the provisions of that act to make a second entry, especially in view of the fact that he had a prior pending application for the same land, supported by a showing tending to evidence that he in fact had never had the benefit of the homestead right.

Departmental decision herein of June 1, 1908, 36 L. D., 450, vacated.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 4, 1909.* (G. C. R.)

June 1, 1908 (36 L. D., 450), the Department reversed your decision of March 14, 1908, dismissing Fred Hinz's protest against Andreas Moritz's application for second homestead entry, and allowing Moritz's homestead entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 20, T. 130 N., R. 69 W., 6 p. m., Bismarck, North Dakota. June 24, 1908, the Department entertained motion for review, answer to which is filed, and the case is before the Department for decision.

July 29, 1905, Moritz made homestead entry for the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 27, N. $\frac{1}{2}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, same township, which November 21, 1906, he relinquished and at the same time applied for

second entry for the land first above described, which he supported by corroborated affidavit that before his first entry he examined the land and thought it cultivable, but after entry discovered it was the bed of a lake free of water only in dry weather and was under water the whole year 1906 and he was unable to plow or cultivate, improve or live on it; that he entered in good faith and had not sold or agreed to sell or relinquish it. Under practice of your office action on his relinquishment was deferred to determination of his right to make second entry.

April 16, 1907, Fred Hinz applied to enter the land in Moritz's application for second entry. Hinz's application is not in the files here. Therewith he filed protest against Moritz's application, supported by corroborated affidavit that the land Moritz first entered was not worthless for agricultural purposes and Moritz's statements respecting it are untrue, asking leave to prove his charges. Moritz thereupon protested against allowance of Hinz's application, filing affidavits to support his statements. May 20, 1907, Margaret Christelow filed contest against Moritz's original entry charging abandonment. After personal service of notice, Moritz defaulted and you canceled his entry, January 25, 1908. March 14, 1908, you allowed Moritz's application and dismissed Hinz's protest, basing that action on act of February 8, 1908 (35 Stat., 6):

That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second homestead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud or who relinquished the former entry for a valuable consideration.

The Department in reversing your action held, in substance, that while Moritz was prior applicant, he was disqualified to make entry until April 17 (16), 1907, when Hinz applied therefor; that Moritz's entry was not canceled of record until January 25, 1908, when Hinz's application was pending; that no right is acquired by an applicant for second entry while the first is of record and not actually abandoned. But the fact was overlooked that Moritz unconditionally relinquished his first entry when he applied for the second, November, 1906, which operated *eo instanti* to terminate it. *Hardy v. Theus* (18 L. D., 589); *Keane v. Brygger* (160 U. S., 276, 287); *Brown v. Gurney* (201 U. S., 184, 193). The relinquishment was received and filed, and the entry should have been then canceled. *Bradway v. Dowd* (5 L. D., 451); *Tilton v. Price* (4 L. D., 123; *Kearney v. Alden* (6 L. D., 579); act of May 14, 1880 (21 Stat., 140). Although Moritz's entry was not canceled of record until January 25, 1908, on a contest,

he in fact had no entry after filing relinquishment, which then divested him of all claim. The contest was unnecessary and should not have been entertained. The fact that Moritz's entry remained of record did not of itself disqualify him to make the entry in question. The Department erred in holding otherwise.

Moritz presents equitable reasons that his second entry should be allowed. He states that since his relinquishment was filed, November, 1906, he expended \$1880 in a frame dwelling, frame barn, curbed well, fencing, breaking and clearing eighty acres; that he moved onto the land with his wife and seven children April 5, 1907; that Hinz has done nothing, and applied for entry long after Moritz was on the land with his family and began his improvements.

Further, if the allegations set forth in Moritz's petition, filed in support of his application for second entry, be true, he has never, in fact, enjoyed the privileges intended to be extended under the homestead law. In July, 1905, he made his first entry after visiting and examining the land and judging it to be cultivable. Subsequently he found it was the bed of a lake, free from water only in dry weather, and he was unable to cultivate it. He had never improved or lived on it, having found it impossible to do so. He entered the land in good faith and relinquished it without consideration. Such statements, if true, rendered the land uninhabitable and uncultivable, so that the object of the homestead law was effectually defeated and he has not in fact had an entry under the homestead law. Departmental decision of June 1, 1908, *supra*, holding otherwise, is vacated and recalled, nor is it necessary now to order a hearing on Hinz's protest and application. Moritz's acts in establishing residence of himself and family on the land now sought, and improving it as he could, are cogent proof that he, at least, believed his statement, accepting peril of total loss of his homestead right and of the labor and money expended in improvement. Whether or not Moritz could have proved his allegation to the satisfaction of the land department has become immaterial in view of the act of February 8, 1908, *supra*, passed during the pendency of his application. The case as made comes clearly within that statute. Hinz obtained no right by his mere application uncoupled by any settlement or valuable improvements that can overcome the equity of a *bona fide* settler who has established residence and made improvements with a *bona fide* intention of making homestead entry and now qualified to make entry. The mere application for entry gives him no right to Moritz's improvements and must yield to Moritz's equity by reason of his settlement and improvement.

Your decision holding Moritz's entry intact and dismissing Hinz's protest is accordingly hereby affirmed.

MINNESOTA SWAMP GRANT—SETTLER PRIOR TO SURVEY—BURDEN OF PROOF.

LAMPI *v.* STATE OF MINNESOTA.

Where the right of the State of Minnesota under its swamp land grant, to lands shown by the field notes of survey to be swamp and overflowed, is questioned by one claiming settlement thereon prior to survey, the burden is upon the settler to apply for a hearing and show that the lands are not of the character contemplated by the grant; and until he shall have assumed such burden and established his case he should not be permitted to make entry of the land.

Directions given that hearings be not had in such cases until after sixty days' notice to the State.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 7, 1909.* (G. B. G.)

The State of Minnesota has filed a motion in the nature of an appeal asking review of the direction given by your office letter of August 6, 1906, promulgating a decision of this Department of July 26, 1906, in the case of *Lampi v. State of Minnesota* (35 L. D., 58), involving the NW. $\frac{1}{4}$ of Sec. 24, T. 62 N., R. 19 W., Duluth land district, Minnesota.

In that case it had been alleged and *prima facie* shown that Lampi had settled on the tract of land above described prior to the official filing of the survey thereof, the field notes of which survey, when filed, showed the land to be of the character contemplated by the grant made to that State of swamp and overflowed lands by the act of March 12, 1860 (12 Stat., 3). Prior to said decision, upon a most careful review of the whole subject (*State of Minnesota*, 32 L. D., 65), the conclusion had been reached by this Department that there was an existing agreement between the United States and the State of Minnesota whereby and whereunder the adjustment of this grant was to have been made upon the field notes of survey. This agreement was not in the nature of a formal contract but a concurrence of mind of officers of the United States and the State that such plan of adjustment was desirable and the most effective one of adjusting this grant. In the *Lampi* case, however, the situation presented the anomaly of a settler upon unsurveyed lands, alleging and presumably believing the same to be agricultural lands and not swamp and overflowed within the meaning of the grant, and a return by the surveyor to the effect that the same lands were of the character contemplated by the grant. It was pointed out in said decision in the *Lampi* case that in such a case, unless the settler be permitted to dispute the field notes of survey he had no protection whatever against fraudulent and erroneous returns although the fact might be that he had settled on lands which were not swamp and overflowed but such as were

desirable for a homestead. It was concluded, therefore, to modify the existing rule of adjustment so as to protect the equities of settlers upon unsurveyed lands, and in that case it was held that where a claim is asserted to public lands in the State of Minnesota, based upon settlement made prior to survey and the lands upon survey are returned as swamp and overflowed and are claimed by the State under its swamp land grant, the settler will be accorded opportunity to show the true character of the lands by evidence other than the field notes of survey, and your office was directed to order a hearing. Promulgating this decision August 6, 1906, your office directed the register and receiver at Duluth, Minnesota, to "take the proper steps looking to a hearing in the case in accordance with the provisions of the circular of December 13, 1886 (5 L. D., 279)," and further directed generally that in future local officers would allow the initiation of proceedings under that circular upon a claim of settlement made prior to survey of lands returned as swamp. It is this specific and general direction that the State is now complaining of and it is urged that the effect of it is to cast upon the State the burden of applying for a hearing in such cases and assuming the burden of proof as to the character of the land.

It is believed that the State's objection to these directions is well taken. The circular of December 13, 1886 (5 L. D., 279), provides in its first four paragraphs for a procedure where settlers upon the public lands dispute the claim of the several States to such lands under their public land grants, and it is these general provisions which your office has attempted to adapt to the present situation in the State of Minnesota. But these rules have no application in the case of a State which has elected to have its swamp land grant adjusted upon the field notes of survey, and paragraph five of these same regulations specifically provides that such regulations shall apply only to those States whose claims are adjusted by examination in the field. The only part of these regulations which is applicable to the State of Minnesota is found in paragraph six, which is as follows:

Where swamp land selections are based upon the field notes of survey, and the land is alleged not to have been in fact swamp and overflowed, and rendered thereby unfit for cultivation at the date of the swamp land grant, the burden of proof will be upon the contestant or adverse claimant under the public land laws.

This is the only part of the circular in question which has any application to the case in hand. In the said decision of *Lampi v. State of Minnesota* no direction was given as to the procedure for carrying it into effect, but it was simply directed that your office order a hearing. If the circular of December 13, 1886, is to be relied on at all, then the direction given by your office was clearly wrong. But it is

believed that paragraph six of said circular above quoted provides for a method of procedure that is altogether in keeping with the rights of the parties, and no reason appears why it should not be adopted in the further adjustment of the swamp land grant to the State of Minnesota, when applicable.

On the merits it seems quite clear, when it is remembered the State is entitled to such lands as are shown by the field notes of survey to be swamp, that if in furtherance of individual equities the rule is relaxed so that a settler may be permitted to dispute these field notes, then the burden of proof should be upon the settler. He should not be permitted to make an entry of the land until he has assumed the burden of proof and established his case. It is upon him that the duty of asking for a hearing is cast, and in the further directions of your office relative to such cases in the State of Minnesota, the procedure will be in accordance with this decision.

Because of the inaccessibility of large portions of the State, and the presumption that the State may not be disposed to contest the claims of its citizens to public lands, if it has had due opportunity to have them examined, any hearing ordered in accordance with this decision will be had only after sixty days' notice thereof to the Governor of the State.

STATE SELECTION—LANDS FORMERLY WITHIN COLUMBIA INDIAN
RESERVATION—CERTIFICATION.

COLE ET AL. *v.* STATE OF WASHINGTON.

Lands formerly within the Columbia Indian reservation and restored to the public domain by the act of July 4, 1884, are subject to selection by the State of Washington under the provisions of the enabling act of February 22, 1889, authorizing selections in satisfaction of the grants to the State from any "surveyed, unreserved and unappropriated lands of the United States."

The certification of lands under a grant that does not require a patent is equivalent to a patent, and the validity of such certification can be questioned only in the courts, subject to the same limitations with respect to the time within which suits may be instituted as govern suits to cancel patents.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 8, 1909.* (S. W. W.)

This case involves the title of the State of Washington to numerous tracts of land in T. 30 N., R. 24 E., and Ts. 30 and 31 N., R. 25 E., Waterville land district, which were certified to the State under section 17 of the enabling act of February 22, 1889 (25 Stat., 681), in part satisfaction of the grant of 100,000 acres of land for the establishment and maintenance of a scientific school.

These lands, which were formerly a part of the Columbia Indian Reservation, were restored to the public domain by the act of July 4, 1884 (23 Stat., 79, 80), which provided that the lands not selected by Indians should be—

restored to the public domain and shall be disposed of to actual settlers under the homestead laws only, except such portion thereof as may properly be subject to sale under the laws relating to the entry of timber lands and mineral lands; entry of which shall be governed by the laws now in force concerning the entry of such lands.

The lands involved herein were selected by the State in list No. 2, filed June 9, 1892, and were afterwards embraced in approved lists Nos. 4 and 10, approved by the Department January 21, 1895, and March 3, 1897, respectively.

During the month of March, 1907, Frank J. Cole and fifty-two others filed in the local office at Waterville homestead applications for said lands and applications to contest the State selections, all of which were rejected by the local office for the reason that the lands were the property of the State of Washington. Appeals were taken by the applicants to your office where the cases were consolidated and, by your office decision of January 16, 1908, the action of the local office was affirmed. The appeal of Cole and others brings the case before the Department.

It is claimed in behalf of the appellants that the lands involved are not and never have been at any time the property of the State of Washington; that said lands were formerly a part of the Columbia Indian Reservation and, as such, title thereto could be acquired only under the act of July 4, 1884, *supra*; and it is urged that the selections by the State were absolutely null and void on their face.

It is further claimed on behalf of the appellants that, under the act by which the lands were restored to the public domain, the said lands were reserved for actual settlers and timber and mineral land claimants only, and that the attempted act of the Department in certifying the lands to the State in defiance of the will of Congress was absolutely void and done without jurisdiction.

It is claimed on behalf of the State: first, that the selections covering the lands in question having been approved by the Secretary of the Interior and certified to the State, the Department has ceased to have jurisdiction over the lands in question, the approval and certification being equivalent to the issuing of the patent; second, that the contestants not being interested parties cannot be heard either in the Department or in the courts to contest the State's rights to the lands in controversy; third, that inasmuch as the Secretary of the Interior has once passed upon the validity of the selections, his decision on this point may not in any event be set aside by his successor; fourth, that in any event the State's title to the lands certified is good because, under the provisions of the enabling act, selections could be made

from the surveyed, unreserved and unappropriated lands of the United States within the limits of the State of Washington, which provision of law, it is claimed by the State, supersedes the act of 1884 by which the lands were restored to the public domain.

Your office decision sustains in every essential respect the various contentions of the State of Washington.

There can be no question that at the time the selections were filed the lands were vacant, unappropriated, unreserved public lands belonging to the United States, and that there was no prior individual or other claim existing thereto. True, said lands had been restored by the special act of 1884 to be disposed of in the manner specified therein, but, subsequent to the passage of this law, the State of Washington was admitted into the Union and, by the enabling act, certain grants were made for educational and other purposes—among them the grant of 100,000 acres for the establishment and maintenance of a scientific school; and it was provided in the enabling act that the lands granted thereby might be selected from the "surveyed, unreserved and unappropriated lands of the United States."

In considering the character of lands which might be selected by the State of Montana in satisfaction of her grants, which were made by the same act as were the grants made to the State of Washington, this Department, in its unreported decision of July 5, 1906, addressed to your office, held that lands formerly within the Gros Ventre and other Indian reservations, which were restored to the public domain for disposition in the manner provided by the act of May 1, 1888 (25 Stat., 133), were subject to selection in satisfaction of said grants.

That act provided that the lands thereby restored to entry should be open to the operation of the laws—

regulating homestead entry except section twenty-three hundred and one of the Revised Statutes and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

In that case the Department concluded that the lands were properly subject to selection by the State when the fact was considered that the enabling act was passed after the act of May 1, 1888, by which the lands were restored to the public domain, and that the enabling act limited the selections only to the surveyed, unreserved and unappropriated public domain of the United States.

Applying the rule laid down in the decision of July 5, 1906, to the case under consideration, it would seem to be obvious that the selections made by the State of Washington of the lands herein involved were regular and valid.

Moreover, it has been repeatedly held by this Department that where patent is not required by the statute, certification is equivalent

thereto and the validity thereof can be questioned only in the courts (11 L. D., 475; 19 L. D., 591; 30 L. D., 543); and in this connection it is but proper to observe that the Supreme Court, in considering the limitations in the act of March 3, 1891 (26 Stat., 1095-1099), upon the institution of suits to cancel patents, said:

It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them. [United States against Winona &c. R. R., 165 U. S., 463.]

From this it will be seen that the court regards certification as equivalent to patent, and that where limitation is imposed by Congress to the institution of suit to cancel patent, the same limitation applies where in the absence of patent certification is equivalent thereto.

As stated by the court in that case, the Government has recognized that as against itself in respect to land transactions it is right that there should be a statute of limitation; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government such conveyance should, after the lapse of the prescribed time, be conclusive against the Government, and that notwithstanding any errors, irregularities or improper action of its officers therein.

No individual is wronged by permitting this certification to stand; no person seeking to enter the tract as a homestead has been deprived of any rights or privileges. The land belonged to the Government and only the Government can now be heard to question the validity of the State's title, and, as has been seen, the Government itself is forbidden by the statute to question the validity of the selections.

The decision of your office is accordingly affirmed.

MINNESOTA SWAMP GRANT—SURVEY—SETTLEMENT PRIOR TO FILING OF PLAT.

ANDERSON *v.* STATE OF MINNESOTA.

Public lands are not surveyed until the approved plat of survey thereof is officially filed in the local land office.

One who at any time prior to the official filing of the plat of survey settles upon lands shown by the field notes to be swamp and overflowed, and claimed by the State of Minnesota under its swamp land grant, is entitled to apply for a hearing and have his claim adjusted upon evidence as to the true character of the land.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 9, 1909.* (G. B. G.)

This is the appeal of Martin Anderson from your office decision of December 2, 1907, rejecting his application to make homestead

entry of the SE. $\frac{1}{4}$, Sec. 12, T. 57 N., R. 10 W., Duluth land district, Minnesota.

The decision appealed from rests upon the ground that the above-described tract of land is claimed by the State under its swamp land grant, and your office also declined to order a hearing affording Anderson an opportunity to show the true character of the land by evidence other than the field notes of survey, for the reason that he did not allege that he made settlement prior to survey of the township.

The subdivisional survey of this township was completed January 29, 1906. The plat thereof was approved and accepted by your office September 26, 1906, and was officially filed in the local land office November 15, 1906. On that day, November 15, 1906, Anderson filed his application, alleging settlement October 30, 1906. In view of the question presented by this appeal it is important to emphasize the fact that this alleged settlement was made between the date of the approval and acceptance of the plat of survey of the township by your office and the official filing thereof in the local land office. It is also a fact of some pertinency to the issues involved that this plat of survey is alleged to have been on file in the local land office thirty-five days before November 15, 1906, the date of the official filing, so that the settlement of Anderson was not only after the plat had been approved and accepted but after it had been actually received at the local land office.

In his corroborated affidavit Anderson states, among other things, that he has since he settled upon and established residence upon the land in controversy continued to reside upon, cultivate and improve it and that before establishing such residence he examined the corners and lines of survey to each legal subdivision of said quarter-section and that the whole quarter-section is high, dry, arable land, valuable for cultivation without any artificial drainage whatever, and that it has all the appearance of having been high and dry at the date of the swamp land grant; that he settled upon the same in good faith, for the purpose of making his home thereon, and has improved it to the value of \$250, and that if the field notes and plats of survey or any return of survey of said land shows it to be swamp land such field notes and plats are false and fraudulent in every particular.

In the case of *State of Minnesota* (32 L. D., 65), decided March 16, 1903, it was directed that all contests or controversies thereafter begun respecting the swampy or non-swampy character of lands in Minnesota, whether theretofore or thereafter surveyed, should be determined by the field notes of the survey. Later, in its decision in the case of *Lampi v. State of Minnesota* (35 L. D., 58), the Department had occasion to consider the inequities of this rule and

modified the same in cases of settlers upon public lands prior to survey, and in said Lampi case it was directed that where a claim is asserted to public lands in the State of Minnesota, based upon settlement made prior to survey, and the lands, upon survey, are returned as swamp and overflowed and are claimed by the State under its swamp land grant, the settler will be accorded opportunity to show the true character of the land by evidence other than the field notes of survey. In that case it was alleged, and *prima facie* shown, that Lampi made homestead settlement upon the land there involved prior to survey in the field, the field notes of survey subsequently made showing that the land was swamp and overflowed. It was directed that your office order a hearing to determine the true character of the land. In the course of that decision, at page 60, it was said:

Of course, in instances where the survey has already been made, a person settling upon such surveyed lands is charged with notice of the surveyor's return, and ought not to be permitted to dispute such return, and thus hamper and delay the adjustment of the State's swamp land grant, but in instances where such settlement is without notice other than such as he may get from an examination of the land, every intendment of the law is in his favor, and he should be permitted to show the real character of the land and thus secure to himself the fruits of his labor.

It will be readily perceived from the foregoing statement of the case that the case of Martin Anderson, now under consideration, differs from that of Lampi in that while Lampi's settlement was made prior to the survey in the field the settlement of Anderson was made after the survey in the field and after the approved plat of survey had been actually received at the district land office. It is not believed, however, that the rights of the parties are materially different.

The General Land Office circular of January 25, 1904, relative to notice of filing plats of survey, provides that:

Hereafter when an approved plat of the survey of any township is transmitted to the register and receiver by the surveyor-general they will not regard such plat as officially received and filed in their office until the following regulations have been complied with: (1) They will forthwith post a notice in a conspicuous place in their office specifying the township that has been surveyed, and stating that the plat of survey will be filed in their office on a day to be fixed by them and named in the notice, which shall not be less than thirty days from the date of such notice, and that on and after such day they will be prepared to receive applications for the entry of lands in such township.

In the case of F. A. Hyde and Company (37 L. D., 164), but recently decided by this Department, it was held upon the authority of *Knight v. United States Land Association* (142 U. S., 161, 182), and *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 594), that the power of the Secretary of the Interior to impose regulations for guidance of his subordinates in the land department does not admit of question, and that under surveying regulations, lands are not sur-

veyed or identified until approval of the plat of survey and filing of the plat by your direction in the local land office. It seems, therefore, to be quite clear that within the meaning of the law and regulations thereunder there is no survey of public lands until the approved plat thereof has been filed in the local land office. (See *Barnard's Heirs v. Ashley's Heirs et al.*, 18 How., 43.) It is also equally clear that under the authorized regulations above quoted the receipt of the plat at the district land office does not constitute a filing thereof. The notice which the local land office is required to publish merely states that the plat has been received and that it "*will be filed* in their office on a day to be fixed by them and named in the notice." This being true, the case under consideration comes within the general lines of the decision in the Lampi case and might, perhaps, be rested on the broad ruling that until survey, that is, until the plat of a survey has been officially filed in the district land office, any settlement preceding such date would authorize the settler to apply for a hearing and have his claim adjusted upon evidence as to the true character of the land.

But, reverting to the difference in the two cases hereinbefore pointed out, there is nothing in this difference which would take the present case out of the spirit of the rule as laid down in the Lampi case, even if it were not within the letter of it. It is not shown or alleged that Anderson had any notice of the surveyor's return relative to this township. It is suggested, as has been seen, that the plat of survey was on file in the district land office before Anderson made his settlement but there is no evidence or specific allegation that he had seen such plat of survey and he was not therefore charged with notice of it in fact. It has already been seen that he is not chargeable with notice of the filing of the plat in law, and inasmuch as it is believed this case comes within both the letter and spirit of the Lampi case the decision appealed from is reversed, with direction to your office to order a hearing.

ROSEBUD INDIAN LANDS—REGULATIONS OF AUGUST 25, 1908,
MODIFIED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 12, 1909.

The Commissioner of the General Land Office.

SIR: The regulations for the opening of the Rosebud Indian lands in South Dakota, issued August 25, 1908 (37 L. D., 124), are hereby so modified as to require persons holding numbers to present their

applications to make entry as follows: Persons holding numbers 1 to 50, inclusive, must present their applications to enter, in numerical order, on April 1, 1909; persons holding numbers 51 to 100, inclusive, must present their applications, in numerical order, on April 2; persons holding numbers 101 to 200, inclusive, must present their applications, in numerical order, on April 3; persons holding numbers 201 to 300, inclusive, must present their applications, in numerical order, on April 5; and so on, at the rate of 100 a day, to and including April 13; at the rate of 150 a day from April 14 to and including April 22; and at the rate of 200 a day from April 23 to and including May 2, Sundays excepted. Persons holding numbers 4,001 to 6,000, inclusive, must present their applications, in numerical order, beginning on September 8, 1909, and continuing from day to day, Sundays excepted, at the rate of 100 a day.

If any person who has been assigned a number entitling him to make entry fails to appear and present his application when the number assigned him by the drawing is reached, his right to make entry will be passed until after all other applicants assigned for that day have been disposed of, when he will be given another opportunity to make entry on that day, failing in which he will be deemed to have abandoned his right to make entry prior to October 1, 1909.

All lands affected by these regulations which have not been entered prior to October 1, 1909, will, on that date, but not before, become subject to settlement and entry by any qualified homesteader, under the general provisions of the homestead laws of the United States and the act of Congress approved March 2, 1907 (34 Stat., 1230), at the price of \$2.50 an acre; and all persons are hereby admonished that under said act of Congress it is provided that no person shall be permitted to settle upon, occupy or enter any of said lands, except in the manner prescribed, until after September 30, 1909.

All the provisions of said regulations of August 25, 1908, not modified by this order, shall be continued in full force and effect.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

NORTHERN PACIFIC ADJUSTMENT—TIMBER AND STONE APPLICATION—ACT OF JULY 1, 1898.

MILES *v.* NORTHERN PACIFIC RY. CO.

A mere application to purchase under the timber and stone act, rejected prior to January 1, 1898, because in conflict with an unapproved indemnity selection by the Northern Pacific Railway Company, but pending on appeal on that date, does not present a claim for adjustment under the provisions of the act of July 1, 1898.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 12, 1909.* (G. B. G.)

This is a motion on behalf of Alexander Miles for review of departmental decision of September 15, 1905 (not reported), rejecting his application, August 15, 1895, to purchase under the timber and stone act of June 3, 1878. (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), the SW. $\frac{1}{4}$ of Sec. 31, T. 55 N., R. 11 W., Duluth land district, Minnesota, and denying the right to adjust the claim thereby initiated to said land under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

The decision sought to be reviewed was a formal affirmance of your office decision of October 16, 1901, it being said by the Department that the matters raised by the appeal of Miles were fully disposed by departmental decisions in the cases of *Richard B. Jones v. Northern Pacific Ry. Co.* (34 L. D., 105) and *Eaton et al v. Northern Pacific Ry. Co.* (33 L. D., 426).

This case is one of a number of such cases that have been long suspended at the request of Mr. H. H. Hoyt, attorney for the said Miles and other claimants for this and lands similarly situated, because of his apparently earnest protest against the attitude of the Department with reference to the questions involved in these cases, as defined in the said case of *Richard B. Jones v. Northern Pacific Railway Company*, and upon his statement that—

the grantee of *Richard B. Jones* has commenced a suit in the district court of the eleventh judicial district, in the State of Minnesota, to determine the correctness of the construction of the act of July 1, 1898, as declared by the Department in the case of *Richard B. Jones*. The action is that of *Herbert H. Hoyt v. Frederick Weyerhaeuser and John A. Humbird*, who are the grantees of the *Northern Pacific Railway Company*. It is the intention of the plaintiff in that case to proceed as speedily as possible to a termination of that case, the final ruling of which will be in the Supreme Court of the United States.

There was for some time a sort of tacit or informal acquiescence in this suggestion for delay, but local counsel for the *Northern Pacific Railway Company* has always protested against such delay and is now insisting that action on these cases be had.

It is true that the suit above referred to was commenced as therein indicated, and it is further true that the Circuit Court of Appeals for the Eighth circuit, on April 17, 1908, held that *Jones* having been permitted by the land department to complete his purchase of the land involved under the timber and stone act, prior to the approval by the Secretary of the railway company's selection of the same land, the entire beneficial interest and equitable right to such land thereby vested in *Jones*, and that the title holders under the patent afterwards issued to the company held the same under such patent in trust for

him and his grantors. *Hoyt v. Weyerhaeuser et al.* (161 Fed. Rep., 324.)

But while this is true, and while such ruling may be ultimately sustained by the Supreme Court of the United States, and the action of this Department in the Jones case be declared erroneous, yet such ultimate result would not be controlling in the case here under consideration. In this case, while Alexander Miles has made application under the timber and stone act to purchase land occupying the same status as that involved in the Jones purchase, yet Miles has not completed his entry and this difference is important and controlling. In the case of *Campbell v. Weyerhaeuser et al.* (161 Fed. Rep., 332), decided on the same day, and by the same court, it was held that Campbell, although an applicant under the timber and stone act for the land there involved, before the approval of the railway company's selection thereof, had not purchased the same, and had not therefore put himself in privity with the United States, could not maintain the action, and that not having purchased the land of the United States or occupied or settled upon or acquired any equitable right to or interest in it prior to January 1, 1898, but his application to purchase having been rejected by the land department when presented, he does not fall within the provisions of said act of July 1, 1898, and can not invoke its aid.

In view therefore of this decision and the belief that the correctness thereof will not be disputed by the Supreme Court of the United States; of the attitude of the company as expressed through its counsel; and in view of the fact that final action upon hundreds of like applications has not been withheld, it results that no good reason appears for making exception of these cases, especially as the only possible beneficial result that might occur to these people, in the event the rulings of this Department and the ruling of the court in the Campbell case should be overruled, would be to accord to these applicants a status different from others like situated. If it becomes generally known that action on applications presented for these railroad lands would be suspended, the entire grant, not already patented, would be immediately applied for. It is not, therefore, believed that further delay in these cases can serve any proper purpose, and nothing being offered in support of the motion for review which was not fully considered at the time the decision of the Department was herein rendered, the motion is denied.

CHARLES A. MEEK.

Motion for review of departmental decision of November 17, 1908, 37 L. D., 259, denied by First Assistant Secretary Pierce, January 13, 1909.

BURNS *v.* BERGH'S HEIRS.

Motion for review of departmental decision of September 14, 1908, 37 L. D., 161, denied by First Assistant Secretary Pierce, January 13, 1909.

MINNESOTA SWAMP LAND GRANT—INDIAN RESERVATION—ACT OF MARCH 12, 1860.

RUTLEDGE *v.* STATE OF MINNESOTA.

The treaties of May 7, 1864, and March 19, 1867, by which a reservation was provided for the Chippewa Indians, were not made pursuant to any law enacted prior to the act of March 12, 1860, making a grant of swamp lands to the State of Minnesota, and hence lands of the character granted lying within said reservation were not thereby excluded from the operation of the grant.

The fact that the State of Minnesota, by virtue of the treaties of 1864 and 1867, may have acquired title to certain lands within the area ceded to the United States by the Chippewa Indians, which would not have accrued to the State in the absence of such treaties or other similar proceedings, in no wise affects the right of the State under its swamp land grant to the lands previously granted to it within the area set aside for the Indians by said treaties.

The provision in section 2 of the swamp land grant to the State of Minnesota that the selection of surveyed lands shall be made within two years from the adjournment of the legislature of the State at its next session after the date of the act, and as to unsurveyed lands within two years from such adjournment after notice by the Secretary of the Interior to the governor of the State that the surveys have been completed and confirmed, is not a condition or limitation of the grant, but merely a direction to the Secretary of the Interior.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 15, 1909.* (S. W. W.)

Franklin J. Rutledge has appealed from the decision of your office of July 29, 1908, denying his application to contest the swamp land claim of the State of Minnesota to the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10, and the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 11, T. 146 N., R. 25 W., $\frac{5}{8}$ P. M., Case Lake land district, Minnesota.

The record shows that on March 21, 1908, Rutledge filed in the local land office at Cass Lake his affidavit of contest against said swamp selection of the above described land, charging as follows:

Now comes Franklin James Rutledge as contestant and Edward David Rutledge as corroborating witness and respectfully shows the Land Department of the Government of the United States that he is over twenty-one (21) years of age, a citizen of the United States, duly qualified to enter the land hereinafter described under the homestead laws of the United States and the act of January 14, 1889 (25 Stat., 642), and is willing, ready and able to enter said land to which he is entitled under and by virtue of said laws. That he

is wrongfully prevented from doing so by the State of Minnesota, that is hereinafter set forth.

Said land is described as follows, to wit: The east half of the southeast quarter (E. $\frac{1}{2}$ SE. $\frac{1}{4}$) of section ten (10) and the west half of the southwest quarter (W. $\frac{1}{2}$ SW. $\frac{1}{4}$), section eleven (11), township one hundred forty-six (146), range twenty-five (25), said Case Lake land district, Minn.

That on the 24th day of February, 1905, or immediately thereafter, the State of Minnesota duly filed its lists and claims of all said land in the proper United States local land office, under and by virtue of an act entitled an act to extend the provision of "An act to enable the State of Arkansas and other States to reclaim the swamp land within their limits" to Minnesota and Oregon and for other purposes, approved March 12, 1860 (12 S. at L., 3), commonly known, and hereinafter referred to, as the Swamp Land Act.

That the State of Minnesota now claims said land under said act and not otherwise. That the said claim of the State of Minnesota to the above described land has not been confirmed, nor the title to said land, or any part thereof, been conveyed in any manner and the patent has not been issued therefor.

That said Franklin James Rutledge desires to contest the said claim of the State of Minnesota and herewith presents his application and affidavit, which are made for the purpose of procuring the cancellation of said list and claim of the State of Minnesota, in order that his application under the said laws may be allowed and that he have thirty days preference right to perfect said entry.

The grounds of said contest and claim duly corroborated are as follows:

First: That the Government of the United States duly reserved and disposed of all the above described land, more than fifteen (15) years before the 24th day of February, 1905, pursuant to laws enacted prior to the date of said Swamp Land Act, March 12, 1860.

Second: That the survey of the above described township, and all land therein, was completed on the 24th day of June, 1876, and duly approved before the 15th day of September, 1876. That the State of Minnesota and its Governor received due notice thereof, before the 10th day of April, 1877. That thereafter the legislature of the State of Minnesota held its due and regular session and adjourned on or before the 8th day of March, 1878. That for more than twenty-five (25) years thereafter the State of Minnesota failed and neglected to select or claim in any manner whatever, the above described land, or any portion or part thereof, under the said Swamp Land Act or at all and in the mean time the rights of bona fide adverse claimants intervened.

Third: That on or before the 14th day of January, 1889, it was duly adjudged, determined and decreed by the United States of America, and with the knowledge and consent of the State of Minnesota, that none of the above described land was in fact swamp or overflow in character within the meaning of said Swamp Land Act, and for that reason the State of Minnesota acquired no interest therein. That the said adjudication has never been overruled, reversed or set aside and the same is now in force. And that more than fifteen years have elapsed after said determination of the character of said land before the State of Minnesota asserted any claim thereto, under the provision of said Swamp Land Act or at all. That in the meantime the rights of bona fide adverse parties intervened and the Government of the United States believing that the said State of Minnesota made no claim whatever, to the above described land, or any portion or part thereof, and relying upon all the facts herein set forth, made final disposition of said land under the law of January 14, 1889 (25 Stat., 642), for the benefit of the said Indians and the public.

Fourth: That heretofore, to wit, on the 7th day of April, 1855, a treaty was duly made and proclaimed between the United States and said Chippewa

Indians, under and by virtue of laws previously passed, wherein and whereby said Indians sold and ceded to the United States a portion of their land in the Territory of Minnesota, then owned and occupied by them and retained other tracts within said territory which the United States then and there reserved, disposed of and granted to said Indians for their permanent homes, as a part of the consideration to said treaty, which said other tracts, so disposed of to said Indians, was therein designated among others as the Gull Lake, Sandy Lake, Rabbit Lake, Pokagomin Lake and Rice Lake Reservations more particularly described in said treaty. That the said Swamp Land Act had no application to said reservation, or either or any of them.

That thereafter, to wit, on the 20th day of March, 1865, another treaty was made between the United States of America and said Chippewa Indians and with the knowledge and consent of the State of Minnesota, wherein and whereby all the land included in said Reservation so disposed of to said Indians (and to which said Swamp Land Act did not apply) was duly exchanged and substituted for another tract known as Chippewa Indian Reservation, which includes all the land first above described which forms the subject of this contest.

That the State of Minnesota received and accepted, under said Swamp Land Act, all the swamp and overflow land within the borders of said Sandy Lake, Rabbit Lake, Pokagomin Lake and Rice Lake Reservation and thereby received all the benefits of said treaty proclaimed March 20, 1865, in lieu and complete satisfaction of any and all claims it had to the land with said Chippewa Indian Reservation, including the subject of this contest.

The local land office held that the foregoing affidavit did not contain charges justifying a hearing and denied the application to contest, from which action Rutledge appealed to your office, where, by your decision of July 29, 1908, the action of the local office was affirmed.

Your office decision held that the allegations contained in the affidavit of contest were not of such a character as to justify a hearing, for the reason that they raised questions of law and not of fact, and that any evidence that might be submitted at a hearing would have no bearing on the case; and furthermore, that the legal questions involved had previously been determined by the Department.

The land involved herein was ceded to the United States by the Chippewa Indians by the treaty of February 22, 1855 (10 Stat., 1165), and included within the exterior boundaries of the tract subsequently reserved for said Indians by the treaties of May 7, 1864, proclaimed March 20, 1865 (13 Stat., 693), and March 19, 1867 (16 Stat., 719). It was selected May 29, 1905, in Minnesota Swamp Land List No. 154.

Inasmuch as none of the questions of fact upon which the contestant's contentions are based have been denied, there seems to be no question as to the correctness of your ruling that the charges contained in the affidavit of contest did not justify the ordering of a hearing. Moreover, ordinary contests or controversies respecting the swamp or non-swampy character of lands in Minnesota are determined by the field notes of survey (32 L. D., 65). In the case of individual contests this rule has been departed from only in cases of

claims initiated prior to survey, where such claimants ask the right to prove the non-swampy character of the land (*Culligan v. State of Minnesota*, 34 L. D., 22; *Lampi v. Minnesota*, 35 L. D., 58).

The Department has also seen fit to order investigations in the field by special agents of the Government, upon the suggestion that the Indians may have some interest in the lands involved.

While the appeal contains a number of specifications of error, it is necessary to consider only the following, as their determination must control the conclusion to be reached herein.

First: That all the treaties and proceedings looking to the disposition of these lands were made pursuant to the law of December 19, 1854 (10 Stat., 598), and the said lands were, therefore, excepted from the operation of the swamp land act.

Second: That the swamp land act lapsed and became of no effect, as to the land involved, because the State failed to claim or select the same within the time specified in the act.

Third: That the State of Minnesota ratified the act of the United States in disposing of the lands involved by the treaties of 1864 and 1867, *supra*, and confirmed said acts; that the State, having received the benefits of said acts, is estopped to deny their full force and effect.

The land in question having been ceded by the Chippewa Indians to the United States by the treaty of 1855, *supra*, and thus being clearly public land of the United States at the date of the passage of the act of March 12, 1860 (12 Stat., 3), if swampy in character, passed to the State by virtue of its grant, unless excepted therefrom by the terms of the grant itself.

The appellant claims that the swamp land act contains two provisions, both of which serve to except the land involved from the operation of the grant: first, the government has reserved or made other disposition of the land, within the meaning of the proviso to the first section of the act of 1860; and, second, that the land was not selected within two years after survey.

These questions have been heretofore specifically considered by this Department and a conclusion reached contrary to the appellant's contention. In the case of the State of Minnesota (27 L. D., 418), it was plainly held that the treaties of 1864 and 1867 were not made in pursuance of the act of 1854, and that the act of January 14, 1889 (25 Stat., 642), which provides for the disposition of these lands, does not come within the terms of the proviso, and cannot defeat the prior grant to the State. See also 32 L. D., 328, and 2 Copp's Public Land Laws, 1081.

It may be true that by virtue of the treaties of 1864 and 1867 the State acquired title to certain lands ceded by the Indians, and which would not have accrued to the State in the absence of such treaties

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or some other similar proceedings, but by accepting such benefits, the State was in no sense required to abandon or relinquish the swamp lands which had previously been granted to it, within the territory set aside for the Indians by the later treaties. The State of Minnesota was not a party to the treaties entered into between the United States and the Indians, and simply because the State incidentally received certain benefits by virtue of said treaties, it by no means follows that the acceptance of these benefits constituted a waiver of rights previously acquired.

The effect of the proviso respecting the making of selections within two years after survey, was most carefully considered by this Department during the year 1906, upon a question presented by the Secretary of Agriculture, and, in view of the importance of the matter, the question was referred to the Attorney-General for his opinion. On June 15, 1906, the Attorney-General advised this Department that the proviso in question was not a condition or limitation of the grant, but merely a direction to the Secretary of the Interior. (See 25 Opinions Attorney-General, 626.)

It will be observed that this opinion supports the views expressed by Secretary Schurz in a communication addressed to the Commissioner of the General Land Office on December 4, 1877 (2 Copp's Public Land Laws, 1081).

The appellant's application for an oral argument has not been overlooked; but in view of the fact that the questions involved have been heretofore carefully considered by the Department, no reason is disclosed by the record for granting the request.

Your decision is affirmed.

PROTEST—NECESSARY ALLEGATIONS—MINERAL CLAIMANT.

YARD ET AL. *v.* COOK.

- A protest should set forth all material and issuable facts with sufficient particularity to apprise the challenged party of the definite nature of the case and enable him to defend without danger of surprise by any fundamental question.
- A protest by a mineral claimant, based upon the alleged mineral character of the land, should set forth the kind of mineral and the character and general situation of the formation claimed by the protestant, as well as any other material matter upon which the respective rights of the parties may be determined.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 19, 1909.* (F. H. B.)

August 20, 1902, Jacob H. Cook filed his application to make forest lieu selection (No. 5772) of the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$, Sec. 20; W. $\frac{1}{2}$ SE. $\frac{1}{4}$

and SW. $\frac{1}{4}$, Sec. 21, T. 26 N., R. 9 E., M. D. M., Susanville, California; land district, which has not yet received official approval.

December 23, 1902, H. H. Yard filed protest, in which he claimed the exclusive right of possession of the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and S. $\frac{1}{2}$ of said section 20, under placer mining locations described in accompanying certificates of location, and alleged that the tracts contain valuable deposits of mineral, to wit, of gold, and are chiefly valuable therefor.

August 28, 1907, the North California Mining Company filed protest against the proffered lieu selection, alleging that it (protestant) had duly and legally located a placer mining claim upon and embracing the NW. $\frac{1}{4}$ of said section 20, and that the tract is mineral in character, chiefly valuable for the mineral therein contained, and so known at the time of the proffer of the lieu selection.

Upon consideration of the protests, your office, by decision of January 4, 1908, held as follows:

The protests are general and indefinite, and you are directed to advise each protestant that he will be allowed sixty days within which to submit a further showing, in the form of a duly corroborated affidavit, stating the character of the deposit, the amount and kind of mineral that has been taken from the land, whether any assays have been made, and if so, as to the results thereof, the character and value of the mining improvements, if any, that have been placed upon the claim, whether water is necessary, and if so, whether the same can be obtained in sufficient quantity for placer mining operations, and that in default and failure to appeal his protest will be dismissed without further notice. (See paragraph 105 of the mining regulations.)

The North California Mining Company has appealed to the Department, and the substance of its contention is that it should allege in its protest only the ultimate fact of the general (mineral) character of the land, and not the evidentiary or probative facts, agreeably to the legal rules of pleading.

No extended argument is made necessary in answer to the contention, which fails only in the application of the principle invoked. Whilst, it is true, under the rules of special pleading at common law, matters of evidence are not to be pleaded, the plaintiff must with such precision and fulness allege the facts upon which he rests his claim (after all, the *ultimate* fact) that the defendant may be advised with reasonable certainty of the cause of action against which he is called to defend. In such a case as this, the case at bar, taking into consideration the variety of mineral substances known to the public domain and the diversified character of the formations or material in which the various minerals are carried, the range of the evidence which the respondent must anticipate upon a general allegation that the land in question is mineral in character is obvious; and no such procedure could logically be sanctioned in any reasonable system.

Whilst paragraph 105 of the mining regulations (31 L. D., 474, 491) merely indicates in a general way the compass of hearings to

determine the character of lands in controversy, so far as the mineral question is concerned, without limitation of the scope of the inquiry in any case to the particular matters alleged in a protest upon which the controversy arises, the Department deems it to be merely consonant with simple principles of legal usage and but fair and just to the party attacked, that the kind of mineral and the character and general situation of the formation claimed by the protestant should be alleged in his protest, as should any other material matter upon which the respective rights of the parties may be determined. What should be so alleged in every conceivable case it is neither practicable nor necessary to specify at this time, as it depends upon the nature of the controversy and of the particular interests involved; but all material and issuable facts should be alleged with sufficient particularity to apprise the challenged party of the definite nature of the case, and enable him to defend without danger of surprise by any fundamental question.

On the other hand, what are in any case clearly matters of evidence—"evidentiary or probative facts"—should not, or at least need not, be so alleged, or plead. Under this head would seem to be included results or values secured by sampling or otherwise exploiting the deposit, by which in part the ultimate fact might be established as alleged. This is particularly suggested in this case by the requirement of your office that they should be alleged in the protests, and with this requirement the Department therefore does not agree. What are purely evidentiary matters in any case it is equally unnecessary, if it were convenient, to anticipate, but no serious difficulty should ordinarily be encountered in the cases in which the question will arise.

The objection above taken goes, consequently, to the matter of assays included in the requirement by your office, and a further question is presented, at the same time, as to the office of an "assay" of placer material, at least in the ordinary cases. At any rate, apart from whatever objection in any instance might be urged on metallurgical grounds, the especial difficulties which attend a determination of the existence of valuable placer deposits require that the values carried should be ascertained, as far as possible, by the most comprehensive and practicable tests with the means available, approximating as nearly as may be the usual processes of active production, together with the fullest showing as to the quantity or extent of the deposit.

Finally, it should be remarked that with new and improved methods, now employed in some cases, it would not necessarily follow that the introduction of water upon the land is essential to the conduct of placer mining operations, and no allegations respecting the subject could properly be considered as among the requisites of a protest, or, if made, foreclose a different showing by the evi-

dence. To the requirement by your office in that regard, therefore, the Department is constrained to take a further exception. These questions, also, should be left for development at the hearing.

With the modifications above indicated, the decision of your office is affirmed; and the record is returned for such further proceedings as may be had in accordance herewith and with the decisions in *Miller v. Thompson* (36 L. D., 492) and *Thomas B. Walker* (*Id.*, 495).

SILVER LAKE POWER & IRRIGATION CO. *v.* CITY OF LOS ANGELES.

Petition for exercise of the supervisory power of the Secretary of the Interior to reconsider departmental decisions of September 9, and November 17, 1908, 37 L. D., 152 and 260, denied by First Assistant Secretary Pierce, January 21, 1909.

MINING CLAIM—EXPENDITURES—WAGON ROAD.

FARGO GROUP NO. 2 LODE CLAIMS.

No part of a wagon road, lying partly within and partly without the limits of a group of mining claims, constructed and used for the purpose of transporting machinery and supplies to, and ore from, the group, is available toward meeting the requirement of the statute respecting expenditures prerequisite to patent.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 21, 1909.* (E. P.)

December 31, 1904, the Eureka Mining, Smelting and Power Company (which will be hereinafter referred to as the Eureka Company) made entry of the Fargo Group No. 2 of contiguous lode mining claims, survey No. 507, La Grande land district, Oregon, embracing the Daisy, Cambridge, Oxford, Stanford, Imnaha, Milan, Bonne, Heidelberg and Evergreen claims. The improvements upon which this entry was allowed are as follows: a tunnel valued at \$150, situated on the Evergreen; a tunnel valued at \$275, situated on the Imnaha; a cut valued at \$110, situated on the Stanford; a cut valued at \$110, situated on the Heidelberg; a cut valued at \$150 and a tunnel valued at \$300, situated on the Daisy; a cut valued at \$500, situated on the Oxford; a cut valued at \$80, situated on the Milan; a cut valued at \$150, situated on the Cambridge; a shaft valued at \$150, situated on the Bonne; also what is termed by the mineral surveyor, in a supplemental report, "an excavation on the side hill for a smelter," valued at \$1,000, situated on the Stanford, and "eight miles of wagon road, the last $\frac{3}{4}$ mile of which crosses

the Daisy, Milan, Heidelberg and Bonne lodes," the entire value of which is given as \$8,000.

The abstract of title filed with the application for patent showed that the Imnaha, Daisy, Cambridge, Oxford and Stanford claims were located by certain persons named Rogers, and were by deed executed October 1 and 2, 1902; conveyed by the locators to the Eureka Company; that amended locations of these claims were on October 11, 1902, made by D. W. Bailey; that the Evergreen claim was on July 5, 1902, located by said Bailey, who also, on October 11, 1902, made amended location thereof; and that the Bonne, Milan and Heidelberg claims were located by said Bailey, October 11, 1902.

It not appearing from the abstract of title that the Eureka Company was the owner of the said Evergreen, Bonne, Milan, and Heidelberg claims, or that the title thereto had ever passed out of D. W. Bailey, the locator thereof, your office, by decision of July 8, 1905, called upon the company to show cause why the entry, as to said four claims, should not for that reason be canceled. On appeal by the company that decision was, by departmental decision (unreported) of September 14, 1906, affirmed.

On November 22, 1906, the company made a showing in response to the rule laid upon it by your office. Deeming this showing insufficient to establish the company's title to the Evergreen, Bonne, Milan and Heidelberg claims, your office by decision of February 28, 1908, canceled the entry to the extent of said claims.

Respecting the Imnaha, Stanford, Daisy, Oxford and Cambridge claims your office, rejecting, as unavailable for patent purposes, the excavation alleged to have been made for a smelter, and so much of the wagon road certified to as lies outside the limits of the group, but applying to each of the claims a one-ninth interest in the three-quarters of a mile of the aforesaid road lying within the limits of the group (the cost of which section or segment is estimated at \$750), found that the improvements on or for the benefit of but two of the claims—the Daisy and the Oxford—are sufficient in value to satisfy legal requirements, and for that reason directed that the claimant be called upon to show cause why the entry should not be canceled also as to the Imnaha, Stanford and Cambridge claims. And inasmuch as the cancellation of the entry as to the Cambridge claim would render non-contiguous the Daisy and the Oxford claims, your office further required the claimant to elect which of these two claims should be passed to patent under the entry.

From this decision the company appeals.

The showing made by the company, in response to the requirement contained in your office decision of July 8, 1905, respecting its title to the Bonne, Evergreen, Milan and Heidelberg claims, consists of a certified copy of an application, dated November 13, 1902, addressed

to the Surveyor-General and signed by D. W. Bailey, "as attorney in fact for the Fargo Gold and Copper Company," for the survey of the Milan, Bonne, Oxford, Violet, Cambridge, Stanford, Evergreen, Daisy and Imnaha claims, which were referred to in the application as ground "claimed by the Fargo Gold & Copper Mining Company;" a proposed notice signed by D. W. Bailey, February 22, 1904, as attorney in fact for the Eureka Company, of the intention of said company to make applications for the claims last above named, except the Violet, for which the Heidelberg was substituted; a copy of an affidavit of protest, executed April 16, 1904, and signed by Bailey as attorney in fact for the Eureka Company, against the homestead entry of one Charles Baker, in which affidavit it is averred that "the Eureka Mining, Smelting and Power Company has located upon said lands" (meaning the lands covered by Baker's homestead entry) "the following named lode claims, to wit: Daisy, Oxford, Cambridge, Bonne, Heidelberg, Stanford, Imnaha and others, as appears from the records;" and a mining deed, executed November 10, 1906, by the Fargo Gold & Copper Mining Company, purporting to convey all its right, title and interest in and to the Bonne, Milan, Evergreen and Heidelberg claims, to the Eureka Company.

In the briefs accompanying the appeal it is insisted by appellant that these papers show conclusively that the four claims last mentioned were located by Bailey in behalf of the Eureka Company, as its agent, and hence that the case, as far as these claims are concerned, falls clearly within the rule stated in the case of *Sold Again Fraction Mining Lode* (20 L. D., 58), wherein it is held (syllabus) that—

A patent for a mining claim may issue on the application of a company, though the location of said claim be made by an individual in whom the possessory right apparently remains, where it is shown that in fact said location was made for and in behalf of said company.

It is also contended that your office erred in refusing to allow each of the nine claims comprising the group credit for a *pro rata* share in the cost of the \$1,000 excavation alleged to have been made for smelter, and the $7\frac{1}{4}$ miles of wagon road lying outside of the limits of the group.

The Department will pass, for the time being, the first contention of appellant and take up for consideration the second. In the case of *Highland Marie and Manilla Lode Mining Claims* (31 L. D., 37), the Department held that a stamp mill, even though constructed and used by an applicant for the express purpose of crushing ores from a group of claims embraced in a mineral entry, cannot be accepted as an improvement made for the benefit of such claims, or any of them, within the meaning of the statute. In that case the stamp mill, whose value was sought to be accredited to the claims there in question, was situated off the group; but in the case of *Monster Lode Min-*

ing Claim (35 L. D., 493) the same rule was applied respecting a stamp mill situated upon the ground for which application for patent was made, the Department holding therein (syllabus) that—

A stamp mill, even though located upon and used exclusively in connection with a mining claim to which it is sought to accredit it, toward meeting the statutory requirement of an expenditure in labor and improvements to the value of \$500.00 as a condition to obtain patent, cannot be accepted as an improvement within the meaning and intent of this statute.

If the value of a completed stamp mill so situated, constructed and used (and a smelter would fall in the same category) cannot be accredited to a mining claim toward meeting the requirements of the statute respecting expenditures, *a fortiori* a mere excavation alleged to have been intended "for a smelter" cannot be so accredited. There was no error, therefore, in the action of your office in refusing to apply the cost of the so-called smelter excavation to any of the claims of this group.

Respecting the availability, as a mining improvement, of a wagon road, lying partly within and partly without the limits of a group of mining claims, constructed and used for the purpose of transporting machinery and supplies to, and ore from, the group, the Department, in the case of Douglas and Other Lode Claims (34 L. D., 556), held that the outlying portion of such a road is too remotely connected with active mining operations on a group of mining claims to justify its acceptance as a credit towards meeting the requirements of the law in the matter of expenditures therefor. If the outlying portion of such a road is, for the reason stated in that decision, unavailable in patent proceedings as a mining improvement, a portion of such a road lying within a claim would seem to be equally unavailable; for it is manifest that the latter portion, if used only for the purpose of transporting supplies to, and ore from, a claim, is no more intimately connected with active mining operations thereon than would be a portion of the same road, similarly used, lying outside the limits of the claim. The transportation of supplies to, and ore from, the claims here in question is the only purpose for which the wagon road, whose value is sought to be accredited to said claims, is alleged to have been constructed or used. The Department is therefore of opinion, that under the circumstances disclosed in this case none of the claims here in question is entitled to be accredited with the value or cost of any portion of said wagon road, whether situated without or within the limits of the group, and so holds.

Eliminating, for the reasons stated, the cost of the so-called smelter excavation, and the entire cost of the wagon road, none of the claims, save the Oxford, comprising this group has been shown to have had expended thereon, or for the benefit thereof, for available improvements, a sum sufficient to meet the requirements of the statute. Hence

it is clear that, aside from any other consideration, the appellant is entitled to a patent to but one of the claims—the Oxford—embraced in the entry. The entry will therefore as to the remainder of the claims be canceled.

This disposition of the case renders it unnecessary for the Department to pass upon the question as to the sufficiency of the company's showing respecting its title to the Evergreen, Bonne, Milan and Heidelberg claims, the record title to which, according to the abstract of title on file in the case, appears to be in Bailey. The Department would suggest, however, in order that future complication in this respect may be avoided, that before another application is made for any of said four claims, title thereto be quieted by appropriate legal proceedings or otherwise formally perfected.

The decision appealed from is modified as herein indicated.

NORTHERN PACIFIC SELECTION—GROS VENTRE LANDS—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO.

The lands formerly embraced within the reservation of the Gros Ventre and other Indians and restored to the public domain by the act of May 1, 1888, are subject to lieu selection by the Northern Pacific Railway Company under the act of July 1, 1898.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 23, 1909.* (S. W. W.)

The Northern Pacific Railway Company has appealed from your office decision of April 28, 1908, holding for cancellation its selection in list 102, under the act of July 1, 1898 (30 Stat., 597, 620), of the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 17, T. 26 N., R. 45 E., Miles City, Montana, land district.

It was held in your decision that the land involved was restored to the public domain by the act of May 1, 1888 (25 Stat., 133), the same being a portion of the land ceded by the Gros Ventre and other Indians, and that it was not subject to selection by the company, reference being made in your decision to the case of *Bradley v. Northern Pacific Railway Company* (36 L. D., 7), wherein the Department held that the lands ceded by said Indians were not subject to indemnity selection by the company.

The appeal charges error in your decision—

1. In holding that the case is controlled by the Secretary's decision in the case of *Bradley* (36 L. D., 7), the land in question not being within the abandoned portion of the Fort Beaufort [Buford] Military Reservation.

2. Error in holding that the land being a part of the ceded portion of the Gros Ventre Reservation, disposal of which was provided for by the act of May 1, 1888 (25 Stat., 133), the same was not subject to selection by the company.
3. Error for any cause in having rejected the company's list.

The lands in question were formerly a part of the reservation established for the Gros Ventre, Piegan, and other Indians and restored to the public domain under the said act of May 1, 1888, which provided that they should be open to—

the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

In thus providing for the disposition of these lands Congress did not by so doing make such appropriation of the lands as to preclude the possibility of future legislation providing for their disposal in such other manner as might be deemed proper.

In the case of *Bradley v. Northern Pacific Railway Company*, *supra*, the company based its right of selection upon the act of 1864 a law in existence at the date of the act of 1888 and not specified in said act of 1888 as one under which the lands might be disposed of. The decision in the *Bradley* case was therefore correct.

However, the right to make the selection herein involved was granted to the railway company by the act of July 1, 1898, *supra*, which provides that the selections may be made—

of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, and not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends.

It can not be said that the act of 1888 operated to reserve the lands. On the contrary, the act was passed for the purpose of releasing the lands from a state of reservation and restoring them to the public domain. The only existing laws applicable to said lands were those mentioned in the act of 1888. At the same time, however, the lands became a part of the unsurveyed public domain and clearly subject to such further legislation as Congress might see fit to enact.

Such was, in effect, the ruling of the Department on July 5, 1906 (not reported), in the matter of Great Falls, Montana, Clear List No. 1, of school indemnity selections, wherein it was held that the lands restored by the act of 1888 were subject to selection under the act of February 22, 1889 (25 Stat., 676), which provided that the lands granted thereby should be selected from the "surveyed, unreserved, and unappropriated public domain of the United States within the limits of the respective States entitled thereto." In that case the Department expressed the opinion that the lands ceded by the

Gros Ventre and other Indians were not reserved or appropriated as against selection by the State, the legislation providing for such selection having been enacted subsequently to the restoration of the lands. This being so, and in view of the fact that the act of 1898, providing for lieu selections by the railway company, having also been passed subsequently to the act of 1888, and inasmuch as the said lands are not reserved, and as it does not appear that they come within any of the inhibitions specified in the act of 1898, it must be held that they are properly subject to selection by the railway company, under said act of 1898.

Your decision is accordingly reversed, and the case remanded for adjudication in accordance with the views expressed herein.

NORTHERN PACIFIC SELECTION—GROS VENTRE LANDS—ACT OF JULY 2, 1864.

BRADLEY *v.* NORTHERN PACIFIC RY. CO. (ON REVIEW).

Lands within the area added to the reservation of the Gros Ventre and other Indians by executive order of April 13, 1875, as modified by executive order of July 13, 1880, come within the purview of the act of May 1, 1888, restoring the lands ceded by the Gros Ventre and other Indians to the public domain, but are not subject to selection as indemnity by the Northern Pacific Railway Company under the act of July 2, 1864.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 23, 1909.* (S. W. W.)

The Northern Pacific Railway Company has filed a motion for review of the Department's decision of July 10, 1907 (36 L. D., 7), in the above entitled case, involving the company's indemnity selection under the act of 1864, of the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 25, T. 25 N., R. 50 E., Miles City, Montana, land district.

In said decision it is held that the lands within that portion of the ceded Gros Ventres, Piegan, Blood, Blackfoot, and River Crow Indian reservation, established by executive order of April 13, 1875, and opened to entry in accordance with the provisions of the act of May 1, 1888 (25 Stat., 113, 133), are not subject to selection as indemnity by the Northern Pacific Railway Company.

The motion assigns error in said decision as follows:

1. In holding as a matter of fact that the land involved lies within that portion of the ceded Gros Ventre Indian Reservation established by the executive order of April 13, 1875, and restored to the public domain by the act of May 1, 1888.

2. In holding that even though the land did fall within the reservation referred to the same was not subject to the company's selection under the act of July 2, 1864.

It is contended on behalf of the company that the land involved herein falls within that part of the reservation created by the executive order of April 13, 1875, and not within that portion set apart by the act of April 15, 1874 (18 Stat., 28), and that inasmuch as the act of May 1, 1888, *supra*, subsequently provided for the disposition of lands within "the reservation set apart by act of Congress approved April 15, 1874," the said land should not be held to be subject to disposition only as provided in said act of May 1, 1888.

Attention is called in the argument to the executive order of July 13, 1880, by which the President restored to the public domain a portion of the country which was set aside for these Indians by the previous order of April 13, 1875, and while not specifically so stated, it is intimated that the land in question is within the limits of the tract so restored. It is insisted that in any event all the lands within the executive withdrawal of 1875 have been restored to the public domain either by the subsequent executive order of July 13, 1880, or by virtue of the fact that the Indians have manifestly and admittedly ceased to use and occupy the same, by reason of which it is claimed they have become subject to the right of selection existing in the company under its granting act.

The reservation created for the Gros Ventres and other Indians by the act of April 15, 1874, *supra*, is situated north of the Missouri River, and inasmuch as the land involved herein is south of the river, it is plain that the said tract was never included in the reservation created by the aforesaid act. The said tract, however, is included in the addition to the reservation which was created by the executive order of April 13, 1875, and it is not within that portion of the reservation restored to the public domain by the subsequent order of July 13, 1880.

The land restored by the latter order is described as follows:

Beginning at a point where the south boundary of the Fort Buford Military Reserve intersects the right bank of Yellowstone river; thence according to the true meridian west along the south boundary of said military reserve to its western boundary; thence continuing west to the right bank of the Missouri river; thence up and along the said right bank with the meanders thereof to the middle of the main channel of the Musselshell river; thence up and along the middle of the main channel of the Musselshell river with the meanders thereof to the intersection with the 47th parallel of north latitude; thence east along said parallel to its intersection with the right bank of the Yellowstone river; thence down and along said right bank with the meanders thereof to the place of beginning.

As shown on the General Land Office map of Montana Territory of 1887, the south boundary of the Fort Buford Military Reservation, which south boundary extended west constituted the north boundary of the tract restored by the executive order of 1880, practically coincides with the north boundary of township 23 north.

Inasmuch, therefore, as all of the land in the former reservation north of township 23 north was retained in the reservation by the executive order of 1880, and as the land involved herein is situated in township 25 north, there is no question that the said tract was not restored to the public domain by the order of 1880.

There seems to have been considerable doubt heretofore as to the status of the entire portion of the reservation lying south of the Missouri river. It is claimed to have been a portion of the boundary of the reservation of the Assinniboiné Indians under the Fort Laramie treaty of September 17, 1851 (Revised Indian Treaties, 1047).

In a note published in 11 Stat., 749, the following appears:

TREATY OF FORT LARAMIE.

This treaty was concluded September 17, 1851. When it was before the Senate for ratification certain amendments were made which require the assent of the Tribes, parties to it, before it can be considered a complete instrument. This assent of all the Tribes has not been obtained and consequently although Congress appropriates money for the fulfillment of its stipulations it is not yet in a proper form for publication. This note is added for the purpose of making the references from the Public Laws complete and as an explanation why the treaty is not published.

It further appears that the Assinniboinés ceded this country by treaty in 1866, which treaty was never ratified, but by their acceptance of a home on the reserve for the Blackfoot, Blood, Gros Ventre, Piegan, and River Crow Indians, established April 15, 1874, they practically relinquished it. See 18th Annual Report of the Bureau of American Ethnology, Part II., p. 786.

However this may be, it is quite certain that the land involved was made a part of the reservation for the Gros Ventre and other Indians, and among them the Assinniboinés, because they were a party to the treaty of 1888, by the executive order of April 13, 1875, and that it certainly was not restored to the public domain prior to the treaty which became effective by its ratification by Congress by the act of May 1, 1888, *supra*.

While it is stated in the treaty which was ratified by the act of 1888 that the reservation set apart by the act of April 15, 1874, was greatly in excess of the Indians' present or prospective wants, and while in the second article of said treaty the Indians ceded and relinquished to the United States all their right, title and interest to the aforesaid reservation, it does not follow that they relinquished only such rights as they had in the reservation created by the act of 1874, because it is specifically provided in said Article 2 that the Indians reserved to themselves only the reservations to be set apart for their separate use and occupation under the terms of the treaty of 1888. If, therefore, the land involved is not included within any reservation

provided for by the act of 1888, it necessarily follows that it was ceded by the Indians.

It will be observed by reference to section 3 of the act of 1888, *supra*, that all the lands to which the right of the Indians was extinguished under the agreement ratified by said act were restored to the public domain to be disposed of under the—

laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

It will thus be seen that the act of 1888 referred not specifically to the lands within the reservation created by the original act of 1874, but, on the contrary, to the lands ceded by the Indians in 1888, and inasmuch as the Indians retained only the specific reservations set apart for them, they necessarily ceded all the remaining lands which had been theretofore reserved for them either by act of Congress or by executive order.

Moreover, it is believed that even had the act of 1888 restored to the public domain specifically the lands set apart for the Indians by the act of 1874, such restoration would have operated to restore also any addition that might have been properly made to the original reservation by executive order. By the President's order of 1875 the status of the Indian reservation was in no way changed, but only an addition was made thereto, and any subsequent act by competent authority restoring the original reservation to the public domain would also have the effect of restoring the addition which had been made thereto, unless such addition had been specifically excepted from the operation of the act of restoration. It will be observed that there is no such exception in this case. On the contrary, it was the evident intention of Congress to restore to the public domain by the act of 1888, all of the lands which had theretofore been reserved for these Indians and which were no longer needed by them.

As heretofore stated by this Department:

These lands as well as that part of the reservation as originally constituted, were referred to by section 3 of the act of May 1, 1888 (25 Stat., 133), as "lands to which the right of the Indians is extinguished under the foregoing agreement" and are subject to its operation to be disposed of in the manner therein indicated. [See Instructions to the Commissioner of the General Land Office of May 11, 1903, L. & R. R. Miscs. Press-copy book 485, p. 325.]

It being concluded from the foregoing that the land in question was restored to the public domain by the act of 1888, disposition thereof can be made only under the provisions of the said act or some legislation subsequent thereto providing for such disposition. The railway company's claim in this case is derived from the granting act of 1864, a law in existence at the date of the act of 1888,

and inasmuch as said law was not mentioned as one under which said lands might be disposed of, it must be held that the land was not subject to indemnity selection by the railway company, and the motion for review is accordingly denied.

NORTHERN PACIFIC ADJUSTMENT—TRANSFeree—ACT OF
JULY 1, 1898.

HUSTON *v.* NORTHERN PACIFIC RY. CO.

Where an owner of land entitled to the right of election accorded by the act of July 1, 1898, transfers the same, such sale will not *per se* be presumed to be an election to retain the land; and in such case the right of election may be exercised by the transferee.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 26, 1909.* (S. W. W.)

This case involves the construction of the act of July 1, 1898 (30 Stat., 597, 620), providing for the adjustment of conflicting claims between individual claimants and the Northern Pacific Railway Company.

A brief statement of the facts leading to the suspension of action in this case, and its subsequent release from such suspension, is deemed necessary to a proper consideration of the matter.

On November 9, 1907, Messrs. Britton & Gray, attorneys for the railway company, addressed a communication to your office alleging that Frank L. Huston, the appellant herein, was attempting to transfer claims which had been denuded of their timber; and requesting that you suspend action upon and investigate eighty-seven of such claims, a list of which accompanied the communication.

By letter "F" of December 3, 1907, your office declined to investigate the claims or to suspend action thereon, and by their letter of February 7, 1908, Messrs. Britton & Gray requested the Department to order a suspension in Huston's cases, until they could be investigated; and with their letter they submitted a list of forty-six cases which had been investigated.

As a result of said letter, the Department directed the suspension of action on the forty-six claims of Huston described in the list, until the protest of the railway company had been disposed of; and on February 26, 1908 (36 L. D., 283), your office was instructed that the railway company should be allowed to apply for a hearing, or hearings, to determine the truth of the charges made in its behalf, and that until full opportunity had been given the company to apply for a hearing, no further action should be taken looking to the adjustment of the pending claims of Huston or others of a like character.

Your office interpreted said instructions as a general suspension of action on all of Huston's claims under the act of 1898, and on March

5, 1908, notified the railway company, Huston, and his attorney, of such suspension, and allowed the company ninety days in which to file applications for hearings.

By letter "F" of April 8, 1908, your office transmitted to the Department the request of counsel for Huston that the order of your office of March 5, 1908, suspending all of Huston's cases, be modified by restricting it to such of the claims involved as were then subject of protest by the railway company.

In considering that request, the Department was confronted with the question as to the right of one whose claim is based upon a transfer made after the passage of the act of July 1, 1898, *supra*, to transfer his claim to other lands, and held that before passing upon Huston's request, that question should be determined. To that end, your office was directed by letter of April 17, 1908, to release from the order of suspension one of the cases wherein it appeared that the land sought to be exchanged by Huston had been conveyed to him after July 1, 1898, and that your office should proceed to an adjudication thereof, giving particular attention to the effect of such conveyance as an election to retain the land. Your attention was invited to the case of William H. Wilcox (35 L. D., 448), in which the Department permitted the transfer of a similar claim, but as it was clear from a casual examination of the facts involved in that case that the effect of transfer subsequent to July 1, 1898, was not the particular question presented for determination, nor was the attention of the Department directed to that feature of the case, and it was not therein considered, you were informed that the decision in that case need not be accorded controlling effect in your adjudication of the case selected for decision.

The attention of your office was also directed to the question as to the time when the right of election under the act of 1898, *supra*, accrued to persons claiming lands within the Portland overlap; and in the event that a decision in more than one case should be necessary to a consideration of the matters involved, the suspension was vacated to the extent required.

On May 19, 1908, you rendered a decision in the case of Wenzel Borde, who on September 11, 1896, made cash entry No. 5171, Vancouver, Washington, series, under the act of September 29, 1890 (26 Stat., 496), for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, T. 6 N., R. 15 E., upon which patent issued December 21, 1896, the land having been transferred by Borde to Huston on February 28, 1907.

Your decision holds that it was the plain intention of the act of 1898 to relieve settlers and claimants who on the date specified therein, January 1, 1898, were holding claims adversely to the company, and to secure to such settlers and claimants the peaceful ownership and

enjoyment of the claims they had maintained; that the right of election granted by the act was a personal right, and not a right incidental to and running with ownership of the land; and that the claimant who sells the land after the right of exchange has accrued, is conclusively presumed to have elected to retain the land. In respect to lands within the Portland overlap, you decided that the right to elect should not be held to have accrued until May 31, 1905, because until that date the benefits of the act would not have been allowed, even if application therefor had been made. In respect to lands not so situated, you held that the claim upon which the right to elect depends must have existed on January 1, 1898, and that any one who thereafter alienated his land thereby indicated his election to retain the same within the meaning of the act.

The land involved herein being within the Portland overlap, which it was held by the Department until April 25, 1905, did not come within the purview of the act, you decided that the act of May 17, 1906 (34 Stat., 197), which was passed for the benefit of settlers on such lands, and by which the provisions of the act of July 1, 1898, were extended to include any *bona fide* settlement or entry within said limits made subsequent to January 1, 1898, and prior to May 31, 1905, should be liberally construed, and that it should be held that the provisions of the act of July 1, 1898, so far as a conveyance indicating a presumption of election to retain is concerned, did not become effective until after May 31, 1905, the date to which the benefits of the original act of 1898 were extended by the said act of May 17, 1906. Inasmuch as Borde did not convey to Huston until February 28, 1907, you decided that Borde's conveyance must be held to have been an election to retain the land.

Respecting those cases, said to be probably few in number, where the claimant on January 1, 1898, or May 31, 1905, as the case may be, has subsequently conveyed the land, but where the railway company is not compelled under the act to relinquish the land, either because the company has sold the land or needs it for the special purposes named in the act, you decided that it would be but equitable to allow the settler and his grantee to relinquish, provided the grantee is willing to do so.

Huston has appealed to the Department, and his counsel have filed elaborate briefs. Though duly served with copies of these briefs, the railway company has filed no answer whatever.

The appeal charges error in your decision as follows:

1. In holding that "the plain intention of the act of July 1, 1898, was to relieve settlers and claimants who on the date specified therein: viz: January 1, 1898, were holding claims adversely to the Company's claims, and to secure to them the peaceful ownership and enjoyment of the claims they had maintained" (italics ours), because on the contrary, the plain purpose of the act was to

afford a means of compromising litigation and, as an inducement, afforded the individual claimant, his heirs and assigns, a *preference in the right* of relinquishment.

2. In holding that "the claimant on January 1, 1898, who thereafter alienated his land, thereby elected to retain the land, because it was only on account of his right of election that *he had* any title to convey". It must be plain that his original title did not depend on his right of lieu selection. He could convey it whenever and to whomsoever he pleased, and let the contest proceed. He did not become a party to the act of 1898 by acceptance, as did the railway company, hence his vested rights remain.

3. In holding that there was any distinction made by the act of 1898 on the question of alienation between patented and unpatented entries. No such distinction can be construed into the act and there is no such distinction in the department's construction of the law and practice since 1904, in allowing relinquishments.

4. The following paragraph in the decision is utterly inconsistent with its conclusion:

"While the onus of adjusting conflicting claims is thrown upon the department, there is nothing in the act which debars either the railroad claimant or the individual claimant from taking the initiative and requesting such adjustment; indeed the instructions of February 14, 1899, *supra*, expressly accords this privilege, and in the vast majority of cases adjusted, the adjustment has been made in response to such a request. As a matter of fact this is about the only practical method by which patented entries could be *brought before the department for adjustment, as there is no way of ascertaining the present owner of such an entry* without an abstract of title; and this, the instructions of February 14, 1899, requires the applicant for adjustment to furnish."

For nearly ten years it has been the practice of the department to require abstracts of title to ascertain the *present owner*, and all adjustments have been made with the present owner under the printed instructions of the department which were a construction of the law.

5. In holding that "a lack of affirmative action" should be considered an election to retain, because this is in the teeth of the letter and spirit of the statute whose mandate expressly requires that notice and option to relinquish be given to the present owner.

6. In fixing May 31, 1905, in reference to alienating the Moiety Lands and Spaulding Strip.

7. In holding that a right of election could be exercised by alienation at a time when the department held that such right of election did not exist in reference to the land alienated, as for instance, in patented entries.

8. In holding that the right of relinquishment does not extend to the claimant, his heirs and assigns, at any time within sixty days after notice of his or their option. The following vital paragraphs in the Commissioner's decision are inconsistent and plainly lead to an erroneous conclusion:

"Unquestionably, Borde, had he retained his ownership of the tracts, would now be entitled to elect either to hold the land, or to relinquish the same and transfer his claim to other lands, under the provisions of said act.

"It does not necessarily follow, however, that because Borde had the right of election, his grantee, *after* January 1, 1898, would have the same rights."

Under the law too well settled for discussion, the assignee by assignment takes all incorporeal hereditaments including everything the assignor had to convey, and it must be plain that the transferee to Huston did not *involuntarily* transfer an admitted right and benefit to the railway company.

9. In holding that it must be presumed that Borde elected to retain the land, because of his act in conveying the same to Huston, because the presumption of the department is consciously predicated upon a falsity, the department being aware of the fact that Borde did not intentionally make any such election, but on the contrary sold his land to Huston at a price enhanced by the understanding between the parties that Huston would be able to relinquish the land and to acquire the right of selection in lieu thereof in view of the departmental construction which obtained at the date of conveyance.

10. In not holding that the date of January 1, 1898, fixed by the act, related to the date of initiation of the entry or purchase and not to the date of death or assignment of the entryman or purchaser.

In addition to the errors assigned in the appeal, counsel charge in their brief that the conclusion reached by your decision constitutes a radical departure from the practice which obtained for nearly ten years under the regulations of February 14, 1899 (28 L. D., 103); which regulations plainly provide in the first paragraph thereof that the beneficiaries under the act include the *assigns* of the claimant; that these regulations, having all the force and effect of law, have been so regarded by the Department and the public acting under them, and have thus become rules of property, and as such, in view of the doctrines of *stare decisis* and *res adjudicata*, should not now be disturbed. In support of this contention, counsel cites a long array of decisions of the courts and the Department, including among the latter the decision in the case of Roy McDonald (36 L. D., 205).

The evident purpose of the act of July 1, 1898, was to afford a means for the adjustment of the conflicting claims of individuals and the Northern Pacific Railway Company. Congress recognized the fact that there were conflicting claims, and the act was passed not for the purpose of affording a means by which the superior right could be readily determined, because the land department and the courts already constituted that means, but the act was passed in order that there might be an adjustment without the necessity of determining this question of superior right. The Department declared this to be the purpose of the act by approving the regulations of February 14, 1899, *supra*, paragraph 10 of which plainly states the purpose of the act; and such is likewise said to be the purpose of the act by the Supreme Court in *Humbird v. Avery* (195 U. S., 480).

This being so, it is clearly the duty of the Department to construe and administer the act in the manner best calculated to carry out its intentions, where such can be done without doing violence to the language employed.

It is obviously necessary that the duty of adjusting the conflicting claims be imposed upon the Department; because, as stated by the Supreme Court in *Humbird v. Avery*, *supra*:

By him [the Secretary of the Interior], or under his direction, must be ascertained the facts upon which depend the inquiry whether the lands in question

are within the indemnity limits of the land grant to the railroad company and so situated that a right to them attached by reason of the definite location of the road. He must also inquire whether such lands were purchased by the respective defendants directly from the United States, or were settled upon or claimed in good faith by qualified settlers under color of title or claim of right under a law of the United States or ruling of the Interior Department, and whether the purchaser, settler, or claimant refuses to transfer his entry.

The choice of election is thus shown to be unquestionably bestowed upon the individual claimant, rather than upon the railway company, as it is only upon the election of the individual to retain the land that the right of the company to make a lieu selection may be exercised. To impose restrictions upon this choice, or the manner of exercising it, tends rather to defeat than to serve the purpose of the act.

The law and the regulations plainly provide that before any list is furnished the railway company, the individual whose claim is in conflict must be called upon to elect whether he will relinquish or retain the land. However, the parties interested are not precluded from taking the action necessary to present the case for adjudication without awaiting a specific call from the land department; and thus it may be that the individual claimant, before being called upon to elect, may by acts which unquestionably indicate such intention manifest his election to retain the land. This was recognized by the Department in the cases of *Northern Pacific Railway Company v. Sparling and Newkirk* (32 L. D., 367 and 369). In those cases, however, the right of adjustment awarded the railway company was in no way contested by the individual claimant; and the action taken by the settlers which was considered as an election to retain the land, was manifestly indicative of such intention; and inasmuch as there was a conflicting claim in existence on January 1, 1898, and as the individual claimants offered no objection to the acceptance of the Company's relinquishment, but, on the contrary, had indicated their election to retain the lands originally claimed, the company was allowed to relinquish and select other lands.

It may also be that claimants, by placing it beyond their power to return the land to the railway company in substantially the same condition as existed at the date of the act, may be held to have elected to retain the land; as where the land has been denuded of the timber, which constituted its chief value (*Northern Pacific Ry. Co. v. Huston*, 36 L. D., 283.)

In the case under consideration, however, it is emphatically asserted in the briefs filed by counsel, that the sale by Borde to Huston was made solely to enable the latter to exercise the choice of a lieu selection. This assertion is not denied, and all the circumstances indicate that it is entirely true.

Assuming the truth of this assertion, it does not seem that the Department should arbitrarily set aside the express intention of the individual claimant, and declare that by the mere act of conveyance he elected to retain the land. It is important to note in this connection that the attorneys for the railway company by their letter of March 29, 1907, called the attention of your office to this particular case, stating that it appeared to come within the provisions of the act of 1898, and requesting its adjudication under said act; and with their letter they transmitted an abstract of title showing Frank L. Huston to be the owner of the land.

Your decision holds that prior to his conveyance to Huston, Borde clearly had the right to relinquish the land, and, as suggested by counsel for Huston, if the latter had supposed that a sale by Borde would be considered an election to retain, the issue could have been easily avoided by Borde relinquishing the land and making a lieu selection for Huston's benefit.

This being so, it seems idle to argue that the assignment of the right of election may not be effected by a transfer of the land made for the express purpose of assigning such right.

The Department is, therefore, of the opinion that the right of election may be exercised by a transferee who purchased the land after the right of election had accrued, and that an act of sale, *per se*, should not be presumed to be an election to retain the land.

It is not believed, as suggested in your decision, that the conclusion reached herein will in any manner tend to create rights analogous to scrip, which may be used for speculative purposes; because that right was created by the act itself, and exists in all cases of conflicting claims of the character contemplated by the act. The right exists, regardless of the conclusion reached by the Department, and will be exercised either by the individual claimant upon whom the choice was bestowed by the act, or by the railway company, in the event the individual should elect not to relinquish.

Furthermore, it is learned from informal inquiry of your office, that many cases have been adjudicated where the facts were similar to those involved herein; that the right of a transferee to relinquish has not heretofore been questioned; and it appears from the briefs submitted that, relying upon such practice, large property rights have been acquired.

Under the views of the Department, as announced in the case of Roy McDonald (36 L. D., 205), this would seem to constitute an additional reason for the conclusion reached herein.

Your decision is modified accordingly, and the case remanded for adjudication in accordance herewith, and the instructions of February 26, 1908, *supra*.

NORTHERN PACIFIC GRANT—CONFLICTING CLAIMS—ADJUSTMENT
ACT OF JULY 1, 1898.NORTHERN PACIFIC RY. CO. *v.* LARSON.

Where the Northern Pacific Railway Company declines to reconvey a tract of land inadvertently patented to it in the face of a pending adverse claim, with a view to adjustment of the conflicting claims under the act of July 1, 1898, on the ground that it has theretofore sold the tract, and suit is thereupon instituted which results in annulment of the patent, the company is nevertheless entitled to have its claim adjusted under the provisions of said act.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 26, 1909.* (G. B. G.)

This is the appeal of the Northern Pacific Railway Company from your office decision of July 9, 1907, denying its application for an adjustment under the act of July 1, 1898 (30 Stat., 597, 620), of its claim to the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 31, T. 136 N., R. 43 W., Duluth land district, Minnesota.

This tract of land is within the indemnity limits of the company's grant and was selected by it April 28, 1897. September 8, following, John Larson applied to make homestead entry thereof and at a hearing introduced evidence tending to show occupancy and improvement since 1874. Pending the result of this controversy, patent inadvertently issued to the company, but Larson afterwards filed his election to retain the land under said act of July 1, 1898. Upon the company being called upon to reconvey the title to the United States, so that the case might be adjusted under said act, the company responded that having sold the land it could not reconvey. Suit was thereupon instituted by the United States praying an annulment of the patent and a declaration that the title was in the United States, which suit was successfully maintained, it having been defended by the railway company's transferee but not by the company. January 10, 1903, the company's selection was canceled, instructions given to allow Larson to perfect his entry, and thereafter the company filed its application to have the case adjusted under the act of July 1, 1898, *supra*; but on July 9, 1907, your office denied the application on the ground that the company having failed to accept an adjustment under the act of 1898, when offered, and having preferred to stand the alternative of a suit in court, the company's claim became thereby adjudicated; that it has nothing to adjust; and that it can not now consistently ask further application of the law.

In the case of Northern Pacific Railway Company *v.* George W. Briskey, decided by this Department February 11, 1904 (not re-

ported), an adjustment was allowed under the act of 1898, although the company had previously reported its inability to make relinquishment because it had made sale of the land and the land department had been constrained to try the question between the settler and the railway company's vendee and had decided that the settlement of Briskey excepted the land from the operation of the grant to the company, and awarded the same to Briskey upon such settlement claim.

In the case of *ex parte* Northern Pacific Railway Company (33 L. D., 150), the company reported its inability to make relinquishment of the tract there in question because of a sale thereof, whereupon your office advised one Lansdale, who it appeared had a conflicting claim thereto, January 1, 1898, of such sale, and offered him an opportunity to relinquish his claim to the land, but he elected to retain the tract. Your office then considered the case independently of the act of 1898, holding that the land was excepted from the railroad grant and permitting Lansdale's timber-culture entry made therefor February 25, 1889, to remain intact subject to compliance with law. The company did not appeal from this decision of your office and the same was declared final and the case closed. Thereafter the company initiated proceedings in court to eject Lansdale, and final decision was rendered in the company's favor August 18, 1898, declaring it to be the owner of the land, and as Lansdale never appealed from that decision it became final. In that case it was held that where the company declined to relinquish a tract of land under the provisions of the act of July 1, 1898, on the ground that it had theretofore sold the tract and the land department thereupon considers the conflicting claims to said tract and holds the land excepted from the company's grant, such adjudication will not prevent the adjustment of such conflicting claims under said act where the company subsequently makes settlement of its outstanding contract of sale and secures a reconveyance of the land from its purchaser.

It is believed that these cases are controlling of the questions presented by this appeal. There would not seem to be any material difference between a case in which the conflicting claims have been adjudicated by the land department and one in which, as in this case, such conflicting claims have been adjudicated by the courts. In all of these cases the fact remains that on January 1, 1898, there was such claim to these lands by the Northern Pacific Railway Company as brought it within the adjustment provisions of said act, and it is not thought that subsequent proceedings resulting in a determination as to the ownership of the land defeat the right of adjustment thereby accorded. These adjudications by the Department and by the lower courts do not necessarily relieve the case of controversy where the

company has not abandoned its claim, and it is these controversies which the act was designed to settle.

The decision appealed from is reversed and the case remanded with directions to proceed in accordance with this decision.

**MILITARY BOUNTY LAND WARRANT—LOCATION—SUBSTITUTION—
DISPOSITION OF WARRANT ORIGINALLY LOCATED.**

GREEN C. CHAIRES.

Directions given that where the locator of a military bounty land warrant fails to submit satisfactory evidence of title to the warrant, and is permitted to make substitution of another warrant to which good title is shown, the warrant first used shall be returned to the locator or other person entitled to make the substitution, with an endorsement thereon, in red ink, showing the attempted location upon the particular tract located, with the name of the locator and a reference to the decision adjudging the evidence of title in the locator incomplete.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 27, 1909.* (F. W. C.)

October 31, last, this Department affirmed your office decision of June 8, 1908, requiring Green C. Chaires to perfect title to military bounty land warrant used in the location of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20, T. 8 S., R. 15 E., Gainesville, Florida, before said location should be passed to patent.

The warrant in question was one issued to Michael Long July 29, 1856. Upon the back of said warrant was an assignment executed by the warrantee February 3, 1858. In the departmental decision it was said, in referring to said assignment:

It was evidently executed in blank, but the name of "Frank H. Reger, of the city and county of Denver, Colorado," is inserted in spaces that apparently were left blank at the time of the execution of the assignment.

July 14, 1905, Frank H. Reger obtained a decree from the county court of the city and county of Denver, Colorado, in a suit instituted by him against the unknown heirs of Michael Long, to quiet title to said warrant. . . .

The execution of the assignment in blank was sufficient to convey title, if accompanied by delivery, and a title so acquired could be sold and transferred under the original assignment if the blank is not filled out, so that the last purchaser may insert his name as the original assignee, but your office has full authority to require proof of such ownership, if you have reason to believe that the person whose name is inserted as the assignee did not acquire it by delivery from the assignor or from intermediate assignees whose right and title were regularly acquired from the soldier.

If Reger acquired possession of the warrant as the lawful owner through valid transferees, he needed no decree to perfect his title. The locator may still submit such proof, but the decree of the Colorado court, relied upon by the locator, will not be accepted as evidence of Roger's title.

In December following said decision a personal request was made of this Department, on behalf of Chaires, to be permitted to

substitute a satisfactory warrant in place of the one before described, and on the advisability of granting said request the opinion of your office was on December 5, last, asked. The Department is now in receipt of your letter of January 14, responsive to said request. Therein you say that you see no reason why the privilege of substitution might not be allowed and therein you refer to departmental decision in the case of *Hopkins v. Byrd* (37 L. D., 82). In that case there was a defective title to the warrant used but the case was further complicated by a decision of your office in favor of the validity of the title in one from whom the locator had purchased. In the concluding paragraph of said decision it was said:

In the event that the locator fails to show title to this warrant he may be allowed to make substitution of a warrant of which he is shown to be rightly possessed if it be shown by satisfactory proof that he made a *bona fide* purchase of the warrant here in question and made his location thereof upon the faith of the decision of your office as to its validity, and of the title of Moses within such reasonable time as may be fixed by your office.

After consideration of the matter the Department is of opinion that if it appears that Chaires made a *bona fide* purchase of the warrant in question, and that the transaction relating to the location thereof is in all respects regular and free from objection, he may be permitted, within such reasonable time as your office may fix, to make substitution of a warrant of which he is shown to be rightly possessed, in lieu of the warrant used in the location hereinbefore referred to, and no reason is seen why a like privilege might not be extended to all others so circumstanced.

The question then suggested is: what disposition shall be made of the warrant originally used, a perfect title to which has not been shown? Respecting this matter, it is directed that, upon making substitution as herein provided for of another warrant, the warrant first used be returned to the locator or other person who may be entitled to make the substitution, but that an endorsement be made in some appropriate place upon said warrant, in red ink, showing the attempted location of said warrant upon the particular tract located, with the name of the locator, and a reference to the decision adjudging the evidence of title in the locator incomplete.

OFFERED LAND—PRESUMPTION OF OFFERING—RETURN OF SALE.

GREEN C. CHAIRES.

Whatever presumption may arise that a particular tract of land was offered at public sale, from the fact that it lies within a township directed by proclamation to be offered and that no reason is apparent or shown by the record why it should not have been so offered along with the other lands in the township, is overcome by the fact that the tract does not appear in the list of lands returned as actually offered under the proclamation.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 29, 1909.* (E. F. B.)

This appeal is filed by Green C. Chaires from the decision of your office of October 14, 1908, holding for cancellation his location made December 12, 1905, with a military bounty land warrant, as to the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 33, T. 7 S., R. 15 E., Gainesville, Florida, for the reason that said land had not been offered under the act of July 4, 1876 (19 Stat., 73), and hence was not subject to private cash entry at the date of the act of March 2, 1889, withdrawing public lands from private cash entry.

The location was made upon the land in question together with the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, of said township. You state that, by proclamation of July 13, 1878, it was directed that the land in this township and other townships in the State of Florida be offered at public sale, at Gainesville, Florida, on October 29, 1878, excepting lands previously disposed of or appropriated for divers purposes, but that it does not appear from the tract books that said section 33. was re-offered, and no reason appears why said section was withheld from offering.

In the case of Sandy D. Bullock (37 L. D., 285) the Department in passing upon the question as to the status of a tract of land which might have been offered under the terms of a proclamation, but which was not offered either from inadvertence or from other cause, said:

Mere inadvertence in failing to offer a tract at public sale would not under the former system of disposing of lands at public and private sale subject the tract to disposal at private sale. The question is not whether the land should have been offered, but whether it had been in fact actually offered.

In that case, and in similar cases that have come before the Department heretofore, in which that question was involved, the reason for the failure to offer the tract was shown. No tract could be offered under the proclamation that was covered by an entry, or otherwise appropriated.

If the land has not been offered, it is not subject to private cash entry—whether it was properly or improperly withheld. But the contention of appellant is that it must be assumed that the tract was offered along with the other lands covered by the proclamation, there being no reason for withholding it and no positive or direct proof, either by record or otherwise, that it was not reoffered.

It is true that every presumption is against the misprision of an officer. He is always presumed to do his duty. But whatever presumption may arise as to the offering of the land in the absence of direct and positive proof to the contrary is overcome by the fact that in the list of lands that were offered under the proclamation this

tract is omitted. The presumption is equally strong that in making out the list of lands that were offered, the officers embraced every tract and that there was no neglect, oversight or mistake in their record whatever. Whether the failure to reoffer this land was from inadvertence or otherwise, it does not affirmatively appear from the record that the tract in question was offered, and there being no proof to contradict that record as it now stands, the decision of your office holding that this land has not been offered is affirmed.

McKITTRICK OIL COMPANY *v.* SOUTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of November 13, 1908, 37 L. D., 243, denied by First Assistant Secretary Pierce, January 29, 1909.

NORTHERN PACIFIC GRANT—CANCELLATION OF SELECTION—REIN-STATEMENT—INTERVENING HOMESTEAD APPLICATION.

NORRIS *v.* NORTHERN PACIFIC RY. Co.

The eastern terminus of the grant to the Northern Pacific Railroad Company was fixed by the land department at Duluth, Minnesota; but the Supreme Court of the United States subsequently held the grant to extend as far east as Ashland, Wisconsin. A selection by the company between these points was held for cancellation under the ruling of the land department, but subsequently reinstated under the decision of the court. After the selection was held for cancellation and prior to reinstatement thereof a homestead application was tendered for a portion of the selected land.

Held: That the mere presentation of the application to enter, not based upon settlement, was not sufficient to bar reinstatement of the company's selection.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, January 30, 1909.* (G. B. G.)

This is the appeal of George J. Norris from your office decision of January 23, 1906, holding for rejection his homestead application for the NW. $\frac{1}{4}$, Sec. 15, T. 54 N., R. 12 W., Duluth, Minnesota.

This land is within the indemnity limits of the grant to the Northern Pacific Railroad Company, made by the act of July 2, 1864, and lies east of the eastern terminal of the grant as fixed at Duluth by departmental ruling of October 29, 1896, in the case of Northern Pacific Railroad Company (23 L. D., 428). The company had made indemnity selection of the tract prior to said departmental ruling but upon such ruling the selection was ordered canceled, March 22, 1897. Subsequently, however, the Supreme Court of the United States in the cases of *Doherty v. Northern Pacific Railway Co.* (177

U. S., 421), and *United States v. Northern Pacific Railroad Co.* (id., 435), having held that the grant to that company extended eastward to Ashland, Wisconsin, the company's selection of said tract was reinstated. March 26, 1897, which was after the date of such order of cancellation and before reinstatement of the selection, the said George J. Norris proffered a homestead application for said tract, and it being assumed that the case thus presented was subject to adjustment under the act of July 1, 1898 (30 Stat., 597, 620), he was called upon by your office to file his election under that act, which he did on January 4, 1902, electing to retain the land. In support of his claim, however, he then stated that he had always made his home in Duluth; that he had made no improvements whatever on the land and had not cultivated it; that he had only visited the land once, in December, 1897, but that he did not work thereon and had no personal property there January 1, 1898. Upon this showing your office held that the claim was not subject to adjustment under said act and that his application did not defeat the claim of the railway company because of the fact that the attempted cancellation of its selection was illegal.

Under the regulations issued February 14, 1899 (28 L. D., 103, 105), pursuant to said act of July 1, 1898, and the decisions of the Department since rendered, it is clear Norris did not have on January 1, 1898, such claim as brought it within the provisions of that act. He had not prior to that date, by settlement, entry or purchase, initiated a claim to the land.

The only claim Norris had, therefore, must be found in his said application to enter the tract under the homestead law. It is believed that this was not such claim as defeated the railway company's selection. While it is true that before the application was presented the railway company's selection had been ordered canceled, it appears from a notation made by the register of the district land office, attached to the homestead application papers of Norris, that the local officers did not act upon or reject such application until August 27, 1902, at which time, it appears from such notation, the rejection was made "because of conflict with Northern Pacific Railway Company's selection list No. 15, now intact on the records of this office, and no settlement being claimed." It does not satisfactorily appear whether or not the records of the local land office were clear of the railway company's selection at the date said homestead application was presented. Presumably that selection was still of record else the local officers would have probably allowed the homestead application. But however this may be, such application was not allowed and the railway company's selection was subsequently reinstated. It was as much within the competency of the land department to reinstate the company's selection as it was to have allowed the homestead application, and inas-

much as the cancellation of the company's selection was improper, its reinstatement, the land not in the meantime having been appropriated by settlement or entry, was in accordance with the rights of the parties.

The decision appealed from is affirmed.

MORGAN *v.* ROWLAND.

Motion for review of departmental decision of August 3, 1908, 37 L. D., 90, denied by First Assistant Secretary Pierce, January 30, 1909.

RECLAMATION ACT—WATER RIGHT—CORPORATION.

WILLISTON LAND COMPANY.

A corporation, otherwise competent, is entitled to acquire a water right under the act of June 17, 1902.

First Assistant Secretary Pierce to the Director of the Reclamation
(G. W. W.) *Service, February 2, 1909.* (J. R. W.)

October 23, 1908, you reported to me that application had been made by the Williston Land Company, incorporate under laws of North Dakota, for water right under the Williston project, which you stated—

brings up the question whether a corporation is qualified to apply for and perfect a water right in connection with (or under) works constructed under the provisions of the act mentioned. . . . It is the belief of this office that a corporation is not qualified to acquire a water right under the provisions of the reclamation act.

The report was the same day referred to the General Land Office, which, December 8, 1908, reported its opinion that as the applicant was a domestic corporation of North Dakota, where the project is situate, "having its principal place of business within a half mile of the lands intended to be irrigated, its application should be accepted and water furnished for not exceeding one hundred and sixty acres of land," provided it show "its members (stockholders) have not individually obtained water rights for private land."

The evident policy of the act is to render the arid public lands capable of productive agriculture and to assure their disposal in small holdings as homes of a resident home-owning agricultural population. It was known and recognized in the act that pioneers had gone upon these fertile valley lands, reduced some of them to private ownership, and appropriated some of the available waters.

Section 7 provided for acquiring private property when necessary to build the larger public work, and section 8 protected "any vested right acquired" by "appropriation, use, or distribution of water used in irrigation under local or national laws."

One object of the act was to assure return of the cost to the Treasury; another was to protect those who had acquired properties before construction of public reclamation works. With these ends in view, sections 4 and 5, among other things, provided the Secretary shall determine:

Sec. 4. . . . The charges which shall be made per acre upon the said (homestead) entries, and upon lands in private ownership, which may be irrigated by the waters of the said irrigation project. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project and shall be apportioned equitably.

Sec. 5. . . . No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner, unless he be an actual *bona fide* resident on such land or occupant thereof residing in the neighborhood of said land and no right shall permanently attach until all payments therefor are made.

The provisions last quoted are the only ones relating to sale of water for irrigation of other than public land. The phrase "in private ownership" is used as descriptive of lands not public nor subject to disposal under the homestead law. It is not used to distinguish land in individual holding from that held by persons corporate. It was beyond power of Congress directly to control the area of land that should be held by one owner, corporate or not, after title passed from the United States. It could only do so indirectly by limiting the area in one holding that should be served with water from the public works. Such provision would practically prevent consolidation of small holdings into large ones, and be operative so long as the government controls the irrigation works—long after all public lands pass into private ownership. A corporate ownership, in the sense that "private ownership" is used by the statute, is as truly a private ownership as is a title or holding of an individual person. It is thus clear that a corporation, otherwise competent, is entitled to take a water right under the statute.

To hold otherwise, would tend to embarrass and defeat one object of the act which clearly intends to assure reimbursement of the United States for all its expenditures by equitable—that is to say ratable—apportionment of the entire cost upon all the lands irrigable. If lands in corporate holding are excluded from water service, the cost must be apportioned inequitably and unratably on only part of the lands irrigable, or the United States must remain in part not reimbursed, so long as any of the land irrigable remains in corporate holding.

This construction does not tend to defeat the evident intent of the act, to assure actual small holdings. Though the same few persons required by local law to organize a corporation may organize many corporations under different names, they can not thus, without limit, absorb and control large areas of land irrigable under any project into the holding of few individuals. A corporation is but a fictitious person created by the law and permitted to be used by real persons for convenience and purposes of business. But when this fiction is attempted to be used for a fraudulent purpose or to evade the policy of a statute, the tribunal before which such fiction is attempted to be availed of may always look beyond the corporate name and fiction of a new person to distinguish and recognize the individuals it represents and attempts to conceal. *McKinley v. Wheeler* (130 U. S., 630, 636); *Bank of the United States v. Deveaux* (5 Cranch, 61, 87); *United States v. Trinidad Coal Company* (137 U. S., 160, 169); *Baltimore and Potomac R. R. Company v. Fifth Baptist Church* (108 U. S., 317, 330); *J. H. McKnight Company* (34 L. D., 443, 444).

In the last cited case the Department so applied the rule to defeat fraud upon the desert-land act. Upon the same principle and in the same manner, fraud by this device and fiction upon the limitation of area of water rights fixed by the reclamation act may readily be prevented.

SCHOOL LAND—INDEMNITY—FRACTIONAL TOWNSHIP—SECTIONS 2275
AND 2276, R. S.

STATE OF IDAHO.

Where a township is rendered fractional by reason of a permanent body of water, and what would otherwise be the school sections therein can not for that reason be surveyed, the area of land within the township susceptible of survey determines the quantity of indemnity school land to which the State is entitled under sections 2275 and 2276 of the Revised Statutes.

Where what if susceptible of survey would be an entire township is covered by a permanent body of water, the State is not entitled to indemnity for the school sections thereby lost to its grant.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 3, 1909.* (S. W. W.)

The State of Idaho has appealed from your office decision of January 24, 1908, holding for cancellation its school land indemnity selections embraced in lists 90, 95, 98, 99, 100, 105, and 106, involving lots 3 and 4, Sec. 30, T. 5 N., R. 41 E., lots 3 and 4, Sec. 7, T. 7 N., R. 43 E., lots 1, 2, 3, and 4, Sec. 5, lots 1, 2, 3, 4, 5, 6, and 7, Sec. 6, T. 6 N., R. 44 E., lots 2, 3, and 4, Sec. 30, and lots 1, 2, and 3, Sec. 31, T. 7 N., R. 44 E., Blackfoot land district, in lieu of parts of sections

16 and 36, T. 56 N., R. 1 E., alleged to have been lost to the State by reason of "Lake Pend d'Oreille."

It appears from said decision that the official plat of the survey of T. 56 N., R. 1 E., which was filed April 19, 1897, shows that more than three-fourths of said township, including sections 16 and 36, are beneath the waters of said lake; the total area of the land returned by the survey being 5,388.59 acres.

Inasmuch as the provisions of section 2276 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), were believed to entitle the State in such cases to select only 320 acres of land as indemnity on account of such fractional township, you allowed the State sixty days to elect which of said selections it would retain to the amount of 320 acres, and that in the event of failure to indicate such election within the time allowed all of said selections would be cancelled.

The appeal charges error in your decision in holding that the provisions of section 2276 of the Revised Statutes are applicable to the selections involved; in holding that the township 56 N., R. 1 E., is a fractional township within the meaning of sections 2275 and 2276, Revised Statutes; and in holding that the sections numbered 16 and 36 in said township 56 N., R. 1 E., alleged to have been lost by reason of Lake Pend d'Oreille, were not losses from "a natural cause."

Proper consideration of the question involved renders it necessary to review the legislation enacted by Congress providing for grants to the several States for the support of common schools.

The idea of providing for schools by making grants of land seems to have had its inception in the early days of the Continental Congress, when by the ordinance of May 20, 1785, respecting the disposition of the lands in the western territory, it was provided that:

There shall be reserved the lot No. 16 of every township for the maintaining of public schools within said township.

This is said to have been "a reservation by the United States and advanced and established a principle which finally dedicated one-thirty-sixth part of all public lands of the United States, with certain exceptions as to mineral, etc., to the cause of education by public schools." See Public Domain, page 224.

After the formation of the Union by the adoption of the Constitution, Congress, by the act of April 30, 1802 (2 Stat., 173), authorizing the formation of a State government by Ohio, submitted the following proposition which was subsequently adopted by the State:

That the section number sixteen in every township and where such section has been sold, granted, or disposed of, other lands equivalent thereto and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools.

In pursuance of the above, twelve public-land States, or all such admitted into the Union prior to the admission of California in 1850, received a grant of one section, No. 16, for the support of common schools, and thereafter the new States have received two sections, Nos. 16 and 36, with the exception of Utah and Oklahoma, both of which were granted said sections and others in addition.

In the meantime, however, as no provision had been made for a school grant in those townships in which no section sixteen was returned upon survey, Congress passed the act of May 20, 1826 (4 Stat., 179), which provided:

That to make provision for the support of schools, in all townships or fractional townships for which no land has been heretofore appropriated for that use in those States in which section number sixteen, or other land equivalent thereto, is by law directed to be reserved for the support of schools, in each township, there shall be reserved and appropriated, for the use of schools, in each entire township, or fractional township, for which no land has been heretofore appropriated or granted for that purpose, the following quantities of land, to wit: for each township or fractional township, containing a greater quantity of land than three quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one half, and not more than three quarters of a township, three quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one half of a township, one half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one quarter of a township, one quarter section of land.

By the act of February 26, 1859 (11 Stat., 385), similar provision to compensate for deficiencies on account of section 36 was extended to those States entitled to said section for school purposes. These acts were incorporated into the revised statutes as sections 2275 and 2276 which, as amended by the act of February 28, 1891, *supra*, read as follows:

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Terri-

tory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however,* That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principle of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three quarters of an entire township, one section; for a fractional township containing a greater quantity of land than one half, and not more than three-quarters of a township, three quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one half of a township, one half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: *Provided,* That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

From the foregoing it is clear that for the purpose of adjusting the school grant the township was taken as the unit, and Congress plainly declared what should constitute for that purpose a full township, three-fourths of a township, etc., and that the area of the township should determine the quantity of school land to which the State should be entitled if school sections were fractional or entirely wanting.

Where a permanent body of water, such as a lake, etc., occurs, and the township in which it is embraced, or the several townships surrounding it, as the case may be, are thereby rendered fractional, it is evident that only those portions of such townships as are susceptible of being surveyed may properly be regarded as land, and if in such cases the school sections are not surveyed, under the rule of adjustment established by Congress, the area of such land as the township is found to contain will determine the quantity of school land to which the State is entitled. If by reason of its great area

such body of water covers what would otherwise be an entire township or several townships, the State would be entitled to no school land on account of such alleged townships, because there being no land surveyed such townships do not actually exist, and there is nothing upon which the State can base any claim whatever.

It is true that the act of Congress grants indemnity to the States where the school sections are fractional or are wanting, but as shown above the act also clearly provides that the quantity of indemnity must be determined by the area of land contained in the township.

In the case under consideration, the township contains more than one full section of land but not as much as one-fourth of a township, there being no part of either section 16 or 36 returned by the survey. This being the case, the State is entitled to 320 acres of school land to be selected as indemnity.

There seems to be no force in the argument advanced in behalf of the State that because the school sections are wanting on account of a natural loss the State should be entitled to receive two full sections, or 1,280 acres, as indemnity, because, as has been established, the quantity of school land to which the State is entitled is dependent upon the quantity of land contained in the township, unless, of course, the school sections themselves are found in place, in which event they inure to the State.

To recognize this claim of the State would render meaningless those provisions of section 2276 of the Revised Statutes which establish the rule of adjustment. While the grant of indemnity on account of fractional townships is found in section 2275, the *extent* of such grant must be determined by the rule laid down in section 2276, and these two sections must therefore be read together.

Your decision is accordingly affirmed.

COMMUTATION—CONSTRUCTIVE RESIDENCE DURING OFFICIAL EMPLOYMENT.

ED JENKINS.

Credit for constructive residence during official employment will not be allowed in the commutation of homestead entries.

Commutation may be allowed only upon a showing of actual and substantially continuous presence upon the land for the required period.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 3, 1909.* (A. W. P.)

An appeal has been filed by Ed Jenkins from your office decision of May 16, 1908, wherein you affirm the action of the local officers in rejecting his commutation proof offered in support of his homestead

entry No. 40731 (Minot series), made April 20, 1906, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 17, T. 156 N., R. 103 W., Williston, North Dakota, land district.

From the proof testimony it is shown that claimant established his residence upon the above described land about October 13, 1906; that his improvements consist of a frame house, ten by twelve feet, fifteen acres of land broken and under cultivation, a well dug, which, by error of location, is off the land; stone cleared from about ten acres of the tract, total value of which was estimated at from one hundred and fifty to two hundred dollars; that the entryman raised crops on six acres in 1906 and on fifteen acres in 1907; that the entryman was absent from January 20 to March 9, 1907, which absence was authorized under joint resolution passed by Congress January 18, 1907 (34 Stat., 1419); that since March 9, 1907, claimant has been employed as a mine driver by the United States Reclamation Service at the Williston project, which employment, as shown by the certificate of the engineer in charge, requires that he be stationed constantly at the power-house of said project, and that during said employment the entryman has been absent from the land, except on holidays, on which occasions he returned to his said homestead entry.

Upon consideration of this commutation proof the local officers, by letter of December 14, 1907, rejected same for the reason that the entryman did not show himself "to be holding position by appointment or election within the meaning of the law," hence could not be allowed credit for the time he was in the employ of the Reclamation Service.

On appeal therefrom your office upon consideration of said commutation proof showing, by decision of May 16, 1908, determined that claimant might be credited with actual residence on the land from October 13, 1906, to January 20, 1907, a period of three months and seven days, but in conclusion held that:

While I am of the opinion that the claimant's homestead entry might be protected against a charge of abandonment during the period of his employment by the U. S. Reclamation Service, and his failure from that cause to reside thereon, provided he continues his improvements and cultivation of the land, the period of such employment could not be construed as actual residence with a view to shortening the period of 14 months of settlement, residence, and cultivation required of homestead claimants who commute their entries under Sec. 2301 R. S., as amended by section 6 of the act of March 3, 1891 (26 Stat., 1095).

As basis for his appeal from your said office decision claimant urges that your office erred in failing to hold that his employment and services come within the class of public servants holding office and serving by appointment, and in not holding that he was entitled to credit for such service while in the employment of the government,

and in not accepting his commutation proof, issuing receipt thereon, and allowing the entry to pass to patent.

The Department has carefully examined the proof testimony in this case, the showing as to the character of the entryman's employment accompanying same, as well as the matters now urged upon appeal. By opinion of the Assistant Attorney-General of December 31, 1906 (not reported), it was held that the employment of homestead entrymen by the government as laborers in the construction of irrigation works is in no material respect different from the employment of such entrymen by contractors engaged in the construction of such works, or by contractors engaged in any other work, so far as to confer upon such entrymen exemption from compliance with the requirements of the homestead law. But as to whether the employment of the claimant herein was of the character contemplated by this opinion, the Department does not deem it necessary to now determine, as from careful consideration of this case it appears that the only material question for present determination is whether such an entryman can be allowed credit for constructive residence when offering commutation proof in support of a homestead entry.

The Department has repeatedly and uniformly held that where such an entryman in good faith established and maintained residence on his entry, engagement thereafter in public service requiring residence elsewhere would not be construed into an abandonment of the entry so long as such efforts are made to maintain improvements and cultivation as manifest good faith. This recognition of official duty as an excuse for absence from the land has been recognized, whether imposed by the appointing power or by election. See *James A. Jenks* (8 L. D., 85); *Tomlinson v. Soderlund* (21 L. D., 155); *Dahlquist v. Cotter* (34 L. D., 396), and cases therein cited. It has also been held that after residence has been in good faith established, the continuity is not broken by absence from the land caused by judicial restraint. *Arnold v. Cooley* (10 L. D., 551), and *Reedhead v. Hauenstine* (15 L. D., 554). In no instance, however, has the Department ever held that such absence would be construed as sufficient residence upon the land embraced in a homestead entry to warrant the acceptance of commutation proof; while in the case of *E. N. McGlothlin* (36 L. D., 502) it was specifically held that such absence because of judicial restraint would not be considered residence in making up the period of eight months required by section 9 of the act of May 29, 1908 (35 Stat., 465).

The act of June 16, 1898 (30 Stat., 473), specifically authorized the allowance of credit for residence upon the land during the period of an entryman's absence because of military or naval employment during the war with Spain, but provided that no patent should issue

to any settler who had not resided upon, improved, and cultivated his homestead for a period of at least one year after he had commenced his improvements. In the administration of this act it appears that such entryman in offering commutation proof had been allowed credit for constructive residence during this one year period, but when that question came before the Department in the case of James B. Weaver (35 L. D., 553) it was held that credit for military service as provided by said act could not be allowed as a substitute for such period—actual residence being necessary; and accordingly held that all commutation proofs making such showing of constructive residence must be rejected.

In offering commutation proof in view of the comparatively brief period that an entryman is required to live on the land, he must show, not only that he established a *bona fide* residence thereupon within six months from the date of such entry, but that his actual presence on the land was thereafter substantially continuous to the date of proof (James A. Hagerty, 35 L. D., 252), for, as held by the Department in the case of Fred Lidgett (35 L. D., 371):

The best evidence of residence is the substantially continuous presence of the claimant on the land, and where the entryman seeks to perfect his entry within a shorter period than that allowed for the submission of ordinary final proof, the Department will refuse to accept any other.

In accordance with the principle announced in the above cases, the Department must hold that the showing of constructive residence is not sufficient when offering commutation proof in support of a homestead entry; that in submitting such proofs the entrymen must show as to residence that their presence on the land embraced in their entries was actual and substantially continuous.

The concurring action of the local officers and of your office in rejecting the proof in question was therefore proper, and the decision appealed from is hereby affirmed.

CONSTRUCTIVE RESIDENCE—COMMUTATION—REGULAR FIVE-YEAR PROOF.

ANNA V. KUHN.

Credit for constructive residence during official employment will not be allowed in the commutation of homestead entries; and in regular five-year proof only where actual residence has first in good faith been established.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 3, 1909.* (G. C. R.)

Anna V. Kuhn has appealed from your office decision of October 24, 1908, holding for cancellation cash certificate No. 3063, issued

February 1, 1908, on homestead entry No. 28965, made by her July 11, 1904, for the NE. $\frac{1}{4}$, Sec. 32, T. 160 N., R. 93 W., Williston, North Dakota. Final proof was offered January 17, 1908.

It appears that claimant was employed as assistant postmaster at Park River, North Dakota, from January 1, 1905, to December 13, 1907. She was still acting in that capacity on date of final proof.

Your office took said adverse action because of your finding that she did not establish a *bona fide* residence on the land prior to assuming the said duties of assistant postmaster, and that she could not, therefore, claim exemption from residence on account of official duties.

The appeal admits that Miss Kuhn did not establish residence on the land before she began her duties as assistant postmaster; that her duties in that position "required all her time from January 1, 1905, to January 14, 1908; that it would be impossible for her to spend much time on her homestead." Indeed her final proof clearly indicates that her limited presence on the land, as stated by your office, "possibly ten days," consisted of visits of a few days at a time when she could be spared from the post office.

It is contended that she expended all her savings—

about \$267, in improvements of—frame house, 10 x 12, shingle roof, cellar, good well twenty feet, twenty acres (cultivated), cleared rock, twenty-two acres.

It is urged that Miss Kuhn's good faith was apparent and her acts in harmony with instructions of your office of December 29, 1905 (date subsequent to the day she was appointed to said office), and that it would be "almost a crime to take the home from this girl after she has struggled so hard to acquire it."

The "instructions" of your office which appellant claims to have relied upon and followed are set forth in a letter purporting to be a copy of your office letter of December 29, 1905. The copy reads as follows:

MISS ANNA V. KUHN,

Park River, N. Dak.

MADAM: I am in receipt of your letter of December 14, 1905, stating that you made homestead entry prior to your appointment as postmaster, and asking whether the time you were acting as such officer will count as residence on your land, and whether, if so, you could prove up at the end of fourteen months or whether you must wait five years to do so.

You are advised that where a person makes a homestead entry and is afterwards appointed to a public office, the duties of which require him to be absent from his claim, such absence is held not to be abandonment of the land, provided he continues to improve and cultivate it as required by law. An entryman situated in this way may make proof as in ordinary homestead cases, either by showing compliance with the law for fourteen months and paying the legal price for the land, or without payment by showing compliance with the law for five years.

While your said office decision is correct in holding that absence due to official duties can not be excused, as in this case, where the entryman fails to establish residence prior to assuming such duties, the Department is of opinion that your office was in error in broadly stating to claimant in said letter that compliance with law in the matter of residence for fourteen months, as in commutation, is met when the entryman is prevented by official duties from living on the land.

It is true, residence may be excused when once established where absence from the land is caused by official duties. *A. E. Flint*, 6 L. D., 668; *James A. Jenks*, 8 L. D., 85; *Reeve v. Burtis*, 9 L. D., 525; and *Tomlinson v. Soderlund*, 21 L. D., 155.

Absence under such circumstances may also be excused when the same is caused by judicial restraint. *Arnold v. Cooley*, 10 L. D., 551; *Reedhead v. Hauenstine*, 15 L. D., 554.

In the first class of cases the public may require the presence of the entryman at a place too far distant from the land to permit his residence thereon. If prior to accepting office and without contemplating such duties, he establishes a *bona fide* residence on the land and is thereafter called by the people or by an appointing power to perform public service, his absence from the land attending to these duties is constructive residence and therefore excusable.

In the second class of cases the convict's absence is involuntary. If prior to his arrest, conviction and incarceration his good faith is made manifest by residence, cultivation and improvements of the land, such involuntary absence is always held as constructive residence and is therefore excusable.

Both classes of cases refer in general to regular five-year home-stead proof and do not apply in commutation where full five years' residence is not required.

In the case of *E. N. McGlothlin*, 36 L. D., 502, the Department held:

Absence in prison under judicial restraint will not be considered residence upon the land covered by claimant's commutation proof.

Likewise, it may be said that absence due to official duties will not be considered residence on the land in the sense of excusing the entryman for any part of the short period during which commutation proof may be accepted.

In the case of *James A. Hagerty*, 35 L. D., 252, it was held that one who desires credit in commutation from date of entry—

must clearly and satisfactorily show, in view of the comparatively brief period that he is required to live on the land in order to make commutation proof, and of the fact that he is not obliged to submit proof within the short time in which commutation is allowed, not only that he established a *bona fide* residence on the land within six months from the date of entry, but that his actual presence on the land was thereafter substantially continuous to the date of submitting final proof.

In the case of Fred Lidgett, *idem* 371, it was said:

While it is true the Department recognizes but one character of residence in all cases, and in this respect follows the general rules of law, the distinction between commutation and final proof in relation to the element of time within which full compliance with law may be shown demands a greater degree of proof of good faith on the part of the claimant who elects to complete his entry and acquire title within the limited period allowed by commutation. His election in this particular is voluntary, and by making it he assumes the burden of showing full compliance with the law in the matters of residence, improvement, and cultivation by the submission of the most satisfactory evidence. The best evidence of residence is substantially continuous presence of the claimant on the land, and where the entryman seeks to perfect his entry within a shorter period than that allowed for the submission of ordinary final proof, the Department will refuse to accept any other.

Miss Kuhn was not required to submit proof at so early a date. She may have been and likely was misled by the instructions she received from your office which, as will be observed, were at least misleading. She was not told, however, that she need not establish residence on the land before she took up her official duties. She had no right and no good reason to think that she was released from that plain requirement. Her failure in this respect, even if she had postponed her final proof for full five years and continued in office, would have been fatal to her claim.

The only possible relief which can be extended to her is that suggested by your office, namely, to permit her entry to remain intact, subject to future compliance with law in the matter of residence.

Accordingly, the action appealed from is affirmed.

OFFICERS—LIABILITY OF GOVERNMENT FOR MISTAKES, NEGLIGENCE, ETC.

ALEXANDER WEBSTER.

The United States is not legally bound to make good losses of parties dealing with executive officers of the government, caused by mistake, inadvertence, or even by misfeasance, negligence, or wrong of such officers.

Assistant Secretary Wilson to the Commissioner of Indian Affairs,
(G. W. W.) February 4, 1909. (J. R. W.)

The Department has considered your report of January 22, 1909 (Land 78589-08), of an erroneous sale of lands by mistake, supposed to have been allotted to an Oneida Indian who had died, whereas, in fact, the land was allotted to another Indian of the same name now living.

Abram Webster, Oneida Indian allottee No. 755, died January 25, 1899, having had a son, Alexander Webster, born in 1885, who died July 5, 1897, before his father, entitled to an allotment, but received

none. The father left a widow, Phoebe, and four children, Edward, Katie, Jane, and William, surviving.

Another Abram Webster, allottee No. 931, is living, as is also his son, Alexander Webster, allottee No. 932, born in 1888, to whom was allotted lot 29, Sec. 29, T. 24 N., R. 20 E., twenty-eight acres, Brown County, Wisconsin.

By mistake of identity of the Alexander Webster deceased the land of the living Alexander Webster was sold to C. G. Wilcox for \$290, deed therefor, executed by the heirs of the deceased, was approved June 26, 1905. A contributing cause to such mistake was a decree by the County Court of Outagamie County, Wisconsin, February 21, 1905, that the deceased Alexander Webster was the allottee of the land, purporting to establish the several interests of his heirs in the twenty-eight-acre tract of the living allottee of that name who was not party to that proceeding.

At some time not shown in the papers here Mr. Hart, the superintendent of the Oneida Indian School, Wisconsin, reported discovery of the mistake, and October 9, 1908, you requested him to procure relinquishment from the living Alexander Webster of his lot 29, and other land would be allotted to him. November 20, 1908, the superintendent reported to you that he had fully explained the matter to the living allottee and his father, and that—

after due deliberation, and probably upon legal advice, Abram Webster, on behalf of his son, informs me that he will not accept any other land and will take legal steps to secure the restoration of the tracts sold as the estate of the deceased Alexander Webster.

Upon the foregoing facts you inquire:

Is the government, by supervising the sale, compelled by any law or by any sense of duty to see that Mr. Wilcox is reimbursed for the amount of money he has expended in purchasing the land and a reasonable amount for improvements, if any have been made thereon, or would Mr. Wilcox's remedy be to sue his grantors on the covenant of warranty in the deed. . . . The decision reached by the Department will be regarded as a precedent in cases of a similar nature which may hereafter arise.

So far as the Department is advised, there is no law binding the United States to make good losses of parties dealing with executive officers, caused by mistake, inadvertence, or even by misfeasance, negligence, or wrong of such officers. It was held in *Robertson v. Sichel* (127 U. S., 507, 515) that:

The government itself is not responsible for the misfeasances or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties, and losses, which would be subversive of the public interests. *Story on Agency*, Sec. 319; *Seymore v. Slyck*, 8 Wend., 403, 422; *United State v. Kirkpatrick*,

9 Wheat., 720, 735; *Gibbons v. United States*, 8 Wall., 269; *Whiteside v. United States*, 93 U. S., 247, 257; *Hart v. United States*, 95 U. S., 316, 318; *Moffat v. United States*, 112 U. S., 24, 31; *Schmalz's case*, 4 C. Cl., 142.

To these authorities may be added: *Bigby v. United States* (188 U. S., 400); *International Postal Supply Company v. Bruce* (194 U. S., 601), and *Belknap v. Schild* (161 U. S., 10).

In this case there was no wilful wrong of any one. The complication arose from innocent mistake of identity of one person with another of the same name. One buying land places himself in privity with the person from whom he purchases. It was held in *Moffat v. United States* (112 U. S., 24, 31) that:

A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the application of this doctrine of a *bona fide* purchaser there must be a genuine instrument having a legal existence, as well as one appearing on its face to pass the title. . . . Even in the case of negotiable instruments, where the doctrine is carried farthest for the protection of subsequent parties acquiring title to the paper, it can not be invoked if the instrument be not genuine, or if it be executed without authority from its supposed maker. *Floyd's Acceptances*, 7 Wall., 666, 676; *Marsh v. Fulton County*, 10 Wall., 676, 683.

This was cited with approval in *Hyde v. Shine* (199 U. S., 62, 80).

The instrument Wilcox took, purporting to convey him the land, was not the genuine deed of the heirs of Alexander Webster, allottee No. 932, for that Webster was living and there are no heirs of one living. It was as much the duty of the proposing purchaser, as of the officers of the United States, to ascertain the real allottee, the fact of his death, and what persons were his heirs. It was as ascertainable before the sale as it has been since that but one Alexander Webster obtained an allotment and to identify which of the two was allottee. Upon the authorities above cited, Mr. Wilcox has no claim upon or remedies against the United States, but his remedy is in the courts against those representing themselves to be heirs of the allottee and successors to his estate.

ROSEBUD INDIAN LANDS—SALE OF UNENTERED LANDS IN GREGORY COUNTY, S. D.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 8, 1909.

The Commissioner of the General Land Office.

SIR: It is directed that all that part of the Rosebud Indian reservation in Gregory County, South Dakota, opened to settlement and entry by the act of April 23, 1904 (33 Stat., 254), which had not

been entered prior to August 8, 1908, will be offered for sale at public auction, at not less than \$1.00 per acre, for cash, at the town of Gregory in the state of South Dakota, under the supervision of James W. Witten, superintendent of the opening and sale of Indian lands, beginning on March 25, 1909, and continuing thereafter from day to day, Sundays excepted, so long as may be necessary to the offering of all of said lands.

2. *Area in which lands will be offered.* All contiguous quarter-quarter sections or fractional lots situated in the same technical quarter-section or otherwise conveniently situated will be listed as one tract and offered for sale at the same time, but not more than 640 acres will be sold to any one person.

3. *Qualifications and restrictions.* Purchasers will not be required to show any qualifications as to age, citizenship, or otherwise, and no person will be required to reside upon or improve or cultivate lands sold to him.

4. *Bids by agents, etc.* Bids and payments may be made either through agents or in person, but no bid of less than \$1.00 an acre from the first bidder on any tract, or of less than 10¢ an acre after the first bid has been made, will be considered or accepted; and no bid can be made through the mails or at any time or place other than the time and place at which said tracts are offered for sale.

5. *Payments and forfeitures.* All successful bidders to whom tracts are awarded must, before 4:30 o'clock P. M., on the day succeeding the date on which awards were made to them, Sundays excepted, pay to the receiver of the United States land office at Gregory, South Dakota, the full amount bid by them for such tracts; and, if any bidder fails to make such payment within that time, he will not thereafter be permitted to pay for the tract or to bid on any other tract.

6. *Lands re-offered.* All tracts awarded to persons who fail to make payment therefor, and all tracts which shall not be sold when first offered because the amount bid therefor is deemed too low, will be re-offered for sale after all of said lands have been once offered, or at any other time during the sale which the superintendent shall think best; and all lands which remain unsold after having been offered and re-offered as herein provided will, after the close of the sale, be subject to purchase at private sale from the register and receiver of the United States land office at Gregory, South Dakota, at \$1.00 per acre in cash.

7. *Combinations in restraint of the sale are forbidden* by section 2375 of the Revised Statutes of the United States, which reads as follows:

Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to

bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders or prevents, or attempts to hinder or prevent any person from bidding upon, or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

8. *Suspension or postponement of sale.* If at any time it becomes evident to the superintendent of the sale that there is a combination among bidders, or any other cause which effectually suppresses competition; or if for any other cause it shall seem best to the superintendent to do so, he may suspend such sale temporarily or postpone it indefinitely; and, if in his judgment the highest bid offered for any tract is below its reasonable cash value, the superintendent may reject all bids then offered and again re-offer the tract for sale as herein provided.

9. *Fees and Commissions.* All persons purchasing any of said lands will be required to pay a commission of one per cent on all payments made by them up to and including \$1.25 per acre, but no commissions will be collected on moneys paid in excess of \$1.25 per acre.

10. *Public Notice.* The superintendent will cause notice of the time, terms, and place of sale to be published in a newspaper published in Norfolk and Omaha, Nebraska, Des Moines and Sioux City, Iowa, and Sioux Falls, South Dakota; and he will at the close of sale day conspicuously post the description of the tracts to be offered on the following day.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

PRACTICE—HEARING—COSTS—REIMBURSEMENT.

ZEEK v. EATON.

Where prior to decision on the merits of a contest proceeding the local officers require contestant to reimburse defendant for costs of taking testimony, and on appeal from such requirement their action is sustained, the case should thereupon be remanded for action on the merits.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 9, 1909.* (J. F. T.)

John L. Eaton has appealed to the Department from your decision of September 1, 1908, holding for cancellation his homestead entry number 18573, made June 19, 1900, at the Kingfisher land office, for the SW. $\frac{1}{4}$, Sec. 1, T. 17 N., R. 19 W., I. M., Guthrie, Oklahoma; land district. This appeal will be considered as also taken from

your decision of November 20, 1908, denying Mr. Eaton's motion for review and adhering to your said former decision.

It appears from the record that final proof was submitted on this entry in September 1906, but no action is shown thereon, the proof is not with the files, and upon inquiry at your office such proof is found to be still at the local office.

December 8, 1906, David R. Zeek filed affidavit of contest against said entry, alleging that:

Lloyd Eaton has wholly abandoned said tract of land and changed his residence therefrom for more than five years last past and next prior to the date hereof, since making said entry, and that said Lloyd Eaton has never resided five years continuously or otherwise upon said tract and has failed to improve or cultivate said land as required by law, and has not earned patent to said land as required by law.

Notice issued setting the hearing for March 11, 1907, and directing that testimony be submitted on March 1, 1907, before the Probate Judge of Dewey County, at Taloga, Oklahoma. Notice was personally served on Eaton on January 15, 1907.

On the day appointed the plaintiff appeared in person and by attorney, and the defendant failed to appear. Testimony was submitted by the plaintiff, and on May 20, 1907, the local officers found that:

The land embraced in said H. E. No. 18573 has been wholly abandoned by entryman for over three years past. That for said period of time he has failed to reside upon, improve or cultivate said land. . . .

We are therefore of the opinion that said H. E. No. 18573 should be canceled.

July 31, 1907, contestee filed motion for rehearing, supported by affidavits, and contestant being notified of contestee's action, filed argument in opposition thereto, supported by affidavits. September 10, 1907, the local officers allowed said motion, and fixed the further taking of testimony before the Probate Judge of Dewey County, Oklahoma, at his office in Taloga, Oklahoma, on October 21, 1907, at 10 o'clock A. M. of said day, and final hearing before the local officers on October 28, 1907, at 10 o'clock A. M. of said day. All parties were duly notified and contestee appeared in person with counsel and witnesses and submitted testimony, but contestant did not appear.

November 15, 1907, the local officers notified the attorney for the contestant that contestee had been put to the expense of \$19.92 and ruled the contestant to reimburse the contestee in that sum, giving him thirty days in which to comply, or to appeal, in default of which the contest would be dismissed.

December 20, 1907, contestant filed his appeal to your office, alleging as specifications of error:

1st. Error in the order of September 10, 1907, reopening said case and setting same for a hearing October 21, 1907.

2nd. Error in sustaining motion of defendant, John L. Eaton, that he be reimbursed by contestant for the money expended in taking said testimony on October 21, 1907.

3rd. Error in ordering that contest of David R. Zeek be dismissed without further notice to him on his failure to so reimburse said contestee within thirty days from date of said order of November 15, 1907.

In deciding this appeal, you say to the local officers:

It is argued that after you had rendered your decision upon the original hearing recommending that the homestead entry be canceled, that under Rules 51, 52 and 53 of Rules of Practice, you had lost jurisdiction and could make no further order or take any further action in the case, and that your order of September 10, 1907, granting a further hearing, was without force and effect, and that contestant could not legally be assessed to pay the expenses of the defendant at the second hearing.

The contestant's contention is not well taken. However, it will be observed that your order of September 10, 1907, *supra*, amounted, in effect, to an order for a hearing *de novo*, for it imposed upon the contestant the burden of producing for cross-examination the witnesses who had testified in his behalf.

It was clearly an abuse of your discretionary power to make such an order. On the facts in the case you could, at most, have ordered a further hearing for the purpose of giving the defendant an opportunity to submit testimony in defense of his entry. The only defect in the notice of hearing was that it gave the defendant's name as Lloyd Eaton, instead of John L. Eaton, under which name he made his entry. In opposition to the defendant's motion the contestant filed affidavits to the effect that the defendant was generally known as Lloyd Eaton. Copies of these affidavits were served on the defendant's attorney, but the defendant failed to introduce any testimony to the effect that he was not generally known as Lloyd Eaton. It is further observed that the defendant's signature is smooth and plain, and indicates that he is accustomed to the use of the pen. He was not misled by the notice of hearing, and your order of September 10, 1907, was clearly unwarranted in so far as it required the contestant to again produce his witnesses, in order to afford the defendant an opportunity to cross-examine them. If it be accepted as true that the defendant could not appear on the day set for the hearing, it must nevertheless be held that he lost his right to cross-examine the witnesses who testified in behalf of the contestant.

However, you had authority to order a further hearing in order to give the defendant an opportunity to make his defense (*Piper v. State of Wyoming*, 15 L. D., 93), and the defendant did not move the dismissal of the contest because of the contestant's failure to appear at the second hearing. Under these circumstances it is incumbent upon contestant, if he desires to maintain his status as such, to pay the costs of the defendant's testimony. See *French v. Noonan*, 16 L. D., 481; *Davis v. Eisbert*, 26 L. D., 384. He will accordingly be allowed sixty days from notice of this decision, within which to file in your office the defendant's receipt, or other satisfactory evidence of such payment. Should he fail to appeal or file the required evidence of payment, he will be considered as having lost his status as contestant, and the case will be considered as between the entryman and the Government.

Without fully agreeing with your statement of facts, the Department approves your conclusion upon this part of this case, and is of

the opinion that at this point in the proceeding the case should have been returned to the local office for further proceeding, as indicated in the last paragraph above quoted from your decision.

It will be noticed that this case had not been considered upon the merits by the local officers, no appeal had been taken, upon the merits of the case, to you, and no presentation of the case upon the merits had been made by either party to your office.

Nevertheless, your action is indicated in the words of your decision immediately following the last above quotation therefrom:

This decision as to the contestant does not, however, prevent a consideration of the case on the merits at this time. The entire testimony is now before his office, and the Government is entitled to a decision on the merits.

Thereupon you proceed to make final disposition of the contest upon the merits. This action was clearly in contravention of the rules of practice requiring action by the local officers and appeal therefrom, but the Department cannot hold that your office was without jurisdiction in its proceeding.

It is clear that the contestant by reason of this erroneous proceeding obtained a business advantage, if not an advantage over the contestee. He obtained a decision of the contest before complying with the order to pay the \$19.92, and was in a position to pay that sum as the definite and fixed sum required to entitle him to a prior right to make entry for this tract of land.

It does not necessarily follow, however, that contestee has suffered either loss or wrong by your way of disposing of this contest, as this depends upon the facts in the case. His side of the case was fully presented without cross-examination of his witnesses.

The record has been carefully examined in the light of the briefs filed upon this appeal. It is found that the facts proven by this testimony are clearly, fairly and sufficiently set forth in your decision, so that no restatement thereof is necessary, and that upon consideration of such facts, either as between the contending parties, or between the Government and this entryman, no other disposition of this case can be made than the cancellation of this entry.

It is therefore found that contestee has suffered no actual loss or harm calling for a reversal of your decision.

With the above suggestions as to correct procedure and future action of your office in cases of this nature, your decision is affirmed.

HOMESTEAD ENTRY UNDER RECLAMATION PROJECT—RECLAMATION
OF ONE-HALF OF IRRIGABLE AREA REQUIRED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 10, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The act of June 17, 1902 (32 Stat., 388), provides, among other things, that a homestead entryman upon lands to be irrigated by the government under said act, whose entry was made subject thereto, shall *reclaim* at least one-half of the irrigable area of his entry for agricultural purposes.

You are directed to require a claimant under said act who attempts to show the reclamation provided for therein, to submit the testimony of himself, corroborated by two witnesses, showing that the land had been cleared of sage brush or other incumbrance, leveled, sufficient laterals constructed to provide for the irrigation of the required area, the land put in proper condition, watered and cultivated, and at least one satisfactory crop raised thereon.

You will also notify the project engineer of any applications to make such proof.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

LAND DEPARTMENT—LOCAL OFFICE—CONTEST CLERKS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 15, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Circular of this office of November 19, 1902, with reference to employment of contest clerks at United States land offices, is hereby revoked.

Registers and receivers of United States land offices will employ clerks for reducing testimony to writing in contest cases, when such clerical assistance is required in their offices. No specific authorization for the employment of such clerks will be required, nor will such

clerks be required to file an oath of office. However, these clerks must attach a certificate, signed by them, to the testimony transcribed in each case, to the effect that such testimony is a true and literal transcript of the verbatim report taken at the hearing. Clerks employed for this work should be qualified as competent stenographers and typewriters and must furnish their own supplies.

The compensation to be paid such clerks will be not to exceed fifteen cents per hundred words in the following States, where the amount to be collected from the contesting parties is twenty-two and one-half cents per folio: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

The compensation to be paid such clerks will be not to exceed ten cents per hundred words in the following States, where the amount to be collected from the contesting parties is fifteen cents per folio: Alabama, Arkansas, Florida, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.

When the reducing of testimony to writing in a contest case is done by regularly appointed employees of your office, the total amount received must be deposited to the credit of the Treasurer of the United States.

Please acknowledge receipt hereof at once.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

FRANK PIERCE, *Acting Secretary*.

CONSTRUCTIVE RESIDENCE—OFFICIAL EMPLOYMENT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 16, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: For many years it has been the practice of the Department to permit a homestead entryman who had established residence upon his claim and afterwards had been elected or appointed to a federal, state, or county office, to be absent from his entry if required by his official duty, and to consider such absence constructive residence upon his claim. This ruling includes deputies and assistants in such offices. See 2 L. D., 147; 6 L. D., 668; 7 L. D., 88; 9 L. D., 523, 525; 17 L. D., 195; 21 L. D., 155.

This privilege, which is not a statutory right but rests solely upon departmental rulings, has led to such grave abuse that the objects of the homestead law have been to a great extent defeated. Therefore, the Department has decided to discontinue the said practice in so far as it has been applied to persons appointed to office, and limit it to persons elected to office. All decisions and instructions heretofore given, not in harmony with this view, are hereby overruled or modified in so far as they accredit such absence as residence, to persons not elected to office.

It is not intended, however, to disturb the status of persons who have acted under the rule heretofore prevailing, nor to deny the benefit of the rule to persons who, prior to March 1, 1909, shall have been appointed to such office. Persons having homestead entries, who enter upon public service in non-elective positions to which they were not appointed prior to above date, will be required to comply fully with all of the provisions of the homestead law just as other settlers.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

FRANK PIERCE, *Acting Secretary*.

DRYER v. WALLACE.

Motion for review of departmental decision of September 23, 1908, 37 L. D., 171, denied by First Assistant Secretary Pierce, February 16, 1909.

CONTESTANT-PREFERENCE RIGHT-INTERVENING WITHDRAWAL.

DAVID A. CAMERON.

The act of May 14, 1880, does not confer upon a successful contestant a vested right to enter the land, but merely a preferred right of entry for thirty days as against everyone except the United States.

Where after the cancellation of an entry as the result of a contest, but prior to exercise by the contestant of his preferred right, the land is withdrawn for inclusion within a national forest, the contestant's preference right is thereby defeated.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 17, 1909.* (A. W. P.)

An appeal has been filed by David A. Cameron from your office decision of September 16, 1908, wherein you affirmed the action of the local officers in rejecting his timber and stone application to enter

the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 25, T. 65 N., R. 13 W., Duluth, Minnesota, land district.

It appears from an examination of the record in this case that the above-described land was formerly embraced in the homestead entry of one Bengt Jansson, made December 15, 1902, against which Cameron, on November 12, 1907, filed a contest, on which notice issued, with hearing set for March 4, 1908, which was subsequently continued to April 3, 1908; that prior thereto, to wit, on March 30, 1908, Jansson filed relinquishment of his said homestead entry, whereupon the local officers canceled the same, and notified Cameron of his preferred right of entry under his said contest; that on April 22, 1908, all of the lands in said township embracing the tract in question were withdrawn as an addition to the proposed Superior National Forest, and that on April 30 thereafter Cameron filed his timber land application for this tract, which was on that date rejected by the local officers because of said prior withdrawal.

Upon consideration of this case on appeal therefrom, your office, by the decision now complained of, held that as the homestead entry had been canceled as result of Jansson's relinquishment, the tract embraced therein was public land at the date of the above mentioned withdrawal, and that, in accordance with the principle announced in the case of Jefferson E. Davis (19 L. D., 489), whatever preference right the contestant may have had on the cancellation of this entry was defeated by the intervening proclamation of the President declaring the establishment of a forest reservation which embraced this tract, and that this principle was also sustained in the case of William H. Schmith (30 L. D., 6) and in that of Emma H. Pike (32 L. D., 395). Accordingly, you affirmed the action of the local officers in rejecting Cameron's timber and stone application.

In support of his present appeal, Cameron urges that your office erred in holding that the principle laid down in the above cited cases should control in the disposition of his application herein, for the reason that in the said case of Jefferson E. Davis the land was withdrawn from entry one year and two months before Davis filed his application therefor, and in the case of William H. Schmith, *supra*, the land was withdrawn March 1, 1898, while the homestead entry of one Cummings embracing same was not canceled until January 14, 1899, and that in the case of Emma H. Pike, *supra*, the former desert land entry of Charles Yarten was not canceled until September 10, 1902, but that the land embraced therein had been withdrawn from entry July 17, 1902; while in the case at bar he had contested the homestead entry of Jansson, paid the land office fees, and procured the cancellation of same, notice of which had been given him by the local officers, and of his preferred right for thirty days from such

notice within which to make entry thereof; that it was subsequent to all this action on his part, and during the preference right period, but prior to the tender of his timber land application, that the tract was embraced in the withdrawal, and that, under the holding in the case of *Strader v. Goodhue* (31 L. D., 137), his right to make entry for this land was vested, and could not be defeated by such a subsequent withdrawal.

The Department has carefully examined the cases above cited, as well as the matters urged by the applicant in support of his appeal. It is true, as stated by him, that in all of these cases the lands involved were embraced in a withdrawal prior to the cancellation of the then-existing entries, and that such withdrawals became effective the moment the respective entries were canceled. However, the fact remains that in the case at bar, on the date of the withdrawal, the tract in controversy was in the category of vacant public land, relative to which the applicant had been accorded a preferred right of entry for a period of thirty days from the notice which conferred on him the privilege of making entry thereof in the event he was qualified, in preference to all other applicants; but this was a superior right to make entry of this tract as against all other possible applicants, and not as against the Government.

The applicant cites the case of *Strader v. Goodhue*, *supra*, wherein it was said that "The preference right is not a right vested until a contestant has 'contested, paid the land office fees, and procured the cancellation' of the entry attacked." But it will be noted that in the case of *Emma H. Pike*, *supra*, also cited by your office in the decision complained of, it was said that the facts in the case of *Strader v. Goodhue* negatived the suggestion that it was intended to hold, as a proper construction of the act of May 14, 1880 (21 Stat., 140), that even where a contestant has performed all the prerequisites imposed by said act, he thereby secures a *vested* right; that such construction would imply that the right was of such character that it could not be divested even by an act of Congress authorizing the withdrawal of the land involved for some contemplated public purpose, and that—

The real intention of the language used would perhaps have been more aptly and clearly expressed by saying, as was done in other parts of the decision, that "the preference right does not attach until a contestant has 'contested, paid the land-office fees, and procured the cancellation' of the entry attacked." That the purpose of section 2 of the act of May 14, 1880, *supra*, was solely to award to the contestant a preferred right for thirty days to enter the land, *as against every one except the United States*, is well established.

Thus, it will be observed that the principle announced in the case of *Strader v. Goodhue*, *supra*, was modified in so far as it may have held that any vested right was secured by such a successful contestant.

An order of withdrawal, made by authority of law and by a competent officer, has the force of law, and if unlimited as to the time of its taking effect must, like any other law, operate from the time it is made (Hiram C. Smith, 33 L. D., 677).

The withdrawal herein was without limitation, hence became immediately effective on that date.

As heretofore stated, the tract in question was vacant and unappropriated public land. Cameron had not prior thereto availed himself of his preferred right by making entry thereof, and as such right was not effective as against the Government, the said withdrawal immediately attached. As was held in the said cases of Jefferson E. Davis and William H. Schmith, "Whatever preferred right a contestant may have on the cancellation of the entry under attack, is defeated by an intervening proclamation by the President declaring the establishment of a forest reservation that includes the land embraced within the contested entry;" and this is true whether such proclamation was prior or subsequent to the cancellation of the existing entry. Hence, the concurring action of the local officers and your office in rejecting Cameron's timber and stone application because of the fact that the land had prior thereto been embraced within the withdrawal was proper. The decision appealed from is therefore affirmed.

ABANDONED MILITARY RESERVATIONS—ISOLATED TRACTS.

PETER F. KOLBERG.

The act of August 23, 1894, providing for the disposal of lands in abandoned military reservations in a particular manner, in no wise affects the authority of the Commissioner of the General Land Office to dispose of isolated and disconnected tracts within such reservations under the provisions of section 2455 of the Revised Statutes.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, February 19, 1909. (E. F. B.)

This motion is filed by Peter F. Kolberg for review of the decision of the Department of February 17, 1908, affirming the decision of your office holding for cancellation his purchase at public sale of the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, T. 136 N., R. 80 W., Bismarck, North Dakota, for the reason that said land was not subject to sale as an isolated tract, being within the Fort Rice abandoned military reservation.

It appears that your attention was called to this tract by the application of Kolberg to have it exposed for sale to the highest bidder as an isolated tract, under authority conferred upon the Commissioner of the General Land Office by section 2455, Revised Statutes, and that said tract was offered at public sale, under your direction, and was

purchased by Kolberg on March 17, 1907, at \$2.50 per acre, it being the highest bid.

October 25, 1907, you informed the local officers that said tract was not subject to disposal at public sale as an isolated tract for the reason that the lands in said abandoned military reservation are subject to disposal only under the act of August 23, 1894 (28 Stat., 491), providing for the disposal of abandoned military reservations containing more than 5,000 acres. You held the entry for cancellation, and directed that notice be given to the purchaser.

Although this tract is part of an abandoned military reservation, subject to disposal under the general land law providing for the disposal of lands so situated, and cannot be disposed of under any of the other general land laws, it does not follow that isolated tracts therein may not be sold at public outcry to the highest bidder upon a determination by the Commissioner of the General Land Office that it would be proper to expose for sale such isolated and disconnected tracts, under authority conferred upon him by the act of June 27, 1906 (34 Stat., 517), which substantially reenacts all the provisions of section 2455, Revised Statutes, as in force prior to the amendatory act of February 26, 1895 (28 Stat., 687), and restores to the Commissioner of the General Land Office the same authority given by the statute as originally enacted, to determine when a tract is isolated or disconnected; within the meaning of the statute, and should be offered at public sale.

This case is controlled by the decision of the Department in the case of Edwin J. Miller (35 L. D., 411), in which the distinct issue was, as in this case, whether acts providing for the disposal of lands under one or more of the general land laws is a limitation upon the authority of the Commissioner of the General Land Office to offer at public sale any isolated or disconnected tract of public lands within those limits.

Your decision, holding that the land in question was not subject to purchase by Kolberg, was based upon the well-established rule that where Congress has provided for the disposal of lands under one or more of the public land laws, it is an inhibition against the disposal of those lands, by executive authority, in any other manner or under any other law.

That principle was misapplied in this case for the reason that the land purchased by Kolberg was offered under the authority conferred upon the Commissioner of the General Land Office to order into market and sell at public auction any isolated or disconnected tract not exceeding one quarter section, which, in his judgment, it would be proper to expose for sale, and was not disposed of under one of the "public land laws" as that term is technically applied. The determination by the Commissioner that said tract was an isolated tract of public land which it would be proper to expose to sale was the

proper exercise of authority conferred by the statute and the order for the sale of said land at public outcry, by notice of the said authority, had all the force of a proclamation by the President as to that particular land, and took it out of the operation of the public land law governing the disposal of the public lands so situated.

The act of June 27, 1906, repealed the proviso to the act of February 26, 1895, which restricted the power of the Commissioner by declaring that lands should not become isolated until they had been subject to homestead entry for three years after the surrounding lands have been entered, filed upon, or sold by the Government, and limited the right of purchase by one person to 160 acres. By that repeal the power of the Commissioner to determine when a tract is isolated, and to expose it to public sale, was restored substantially as it was in the original enactment, and the limitation as to the area that may be purchased by one person was removed.

It is expected that such power and authority will be judiciously exercised by the Commissioner and that lands will not be exposed to public sale which may properly be disposed of under the particular public land law or laws applicable thereto, but when, in his judgment, it would be proper to expose to public sale any isolated tract of public land that is subject to sale, he has ample authority to do so under the provisions of section 2455, Revised Statutes.

Congress might provide for the disposal of lands in such manner and upon such conditions as to forbid the exercise of this power, but that question does not arise in this case. It is sufficient to state that the purchase by Kolberg was authorized under the ruling in the case of Edwin J. Miller, which is applicable in all cases where the lands to be disposed of are strictly public lands of the United States subject to disposal under one or more of the public land laws, and where the exercise of the power conferred by said section 2455 will not be in violation of any trust or impair any obligation of the Government.

The motion is sustained. The decision of the Department of February 17, 1908, is vacated and the decision of your office of October 25, 1907, holding for cancellation the entry of Kolberg of the land in question under his purchase at public sale, is reversed, and said entry will remain intact.

IDAHO SCHOOL GRANT—TOWNSITE OCCUPANCY—LANDS EXCEPTED.

STATE OF IDAHO *v.* KINGSTON TOWNSITE.

Where at the date of the act of July 3, 1890, providing for the admission of Idaho into the Union, a portion of a section 16 or 36 was occupied by townsite settlement initiated prior to survey, the grant of sections 16 and 36 made to the State for school purposes by section 4 of that act will not prevent the townsite settlement being carried to entry.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 19, 1909.* (S. W. W.)

The State of Idaho has appealed from your office decision of January 15, 1907, rejecting its protest filed against townsite cash entry No. 2155, issued March 1, 1906, embracing lots 7 and 8, Sec. 36, T. 49 N., R. 1 E., containing 36.84 acres, Coeur d'Alene, Idaho, land district. This entry was made by the Probate Judge of Shoshone County, Idaho, on behalf of the townsite of Kingston, under the provisions of sections 2387 and 2389 of the Revised Statutes.

It appears that the declaratory statement of the intention of the probate judge to make said entry was filed on June 8, 1903; that on January 25, 1904, after due publication, the proof was submitted, the applicant appearing with three witnesses of those named in the notice of publication, before the United States Commissioner in the town of Wallace, in said county, and then and there submitted proof in support of the said application.

Upon receipt of the final proof in your office, it was examined and found satisfactory except as to some minor details, and also except as to want of service upon the State of Idaho, the said entry embracing lands in the school section. It was accordingly held by your office decision of February 13, 1905, to the register and receiver, that inasmuch as the State had not selected indemnity on account of said lots, or any part thereof, no disposition of said lands would be made as against the grant to the State until the State had had notice of the application and had been afforded an opportunity of being heard.

It appears that service of said decision, which allowed the State thirty days in which to protest against the entry, was made upon the governor of the State on March 2, 1905, by registered mail, and that on October 27, 1905, the register transmitted evidence of such service and reported no action taken by the State. However, on November 23, 1905, the register transmitted a protest by the State against the allowance of the said townsite entry, it being alleged in said protest that the section 36 was granted to the State by section 4 of the act of July 3, 1890 (26 Stat., 215); that the land was surveyed in the field September 11, 1884; that when the act of 1890, *supra*, was passed, the land being at that time surveyed, the right of the State became absolute and that thereafter the land department had no authority to allow any entry of the land for any purpose under the United States land laws.

By your office decision of January 15, 1907, it was held that the State was in default in not filing its protest within the period allowed by your former decision of February 13, 1905, as a result of which the case had become closed, in so far as the State was concerned; that, under the acts of Congress making the reservation and grant to the

Territory and State of Idaho, neither could attach to any land prior to the survey in the field; and that, inasmuch as the evidence showed that the land was occupied as a townsite in 1884, which was prior to the survey in the field, said survey having been made in the summer and fall of 1885, your office decision refused to recognize the State's claim.

The appeal of the State brings the case before the Department.

At the time the land in question was first occupied for townsite purposes the laws of Congress recognized the right of persons who desired to establish towns to occupy unsurveyed lands. At that time, *viz.*, in 1884, Idaho was a Territory and the law in force respecting its school lands was section 14 of the act of March 3, 1863 (12 Stat., 808, 814). This law provided that sections 16 and 36 should be reserved for the Territory upon their survey by the United States Government. This provision of the law clearly implies that prior to their survey there was no reservation in favor of the Territory.

Such was the condition upon the admission of Idaho as a State by the act of July 3, 1890 (26 Stat., 215). This act provides in section 4 thereof that sections 16 and 36 in every township of the State and where such sections, or any parts thereof, had been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto are granted to the State for the support of common schools.

While it is true that the lands in question had not been disposed of, in that no patent had been issued therefor, or even that no entry for the same had been allowed, still, according to the record at the date of the act of 1890, *supra*, these lands were occupied by townsite settlers and had been so occupied for a period of five or six years. The townsite settlement had been initiated prior to survey, at a time when the settlers could not possibly know whether or not the lands occupied would fall within or without a school section.

It is not believed that Congress, in granting sections 16 and 36 to the State of Idaho, intended to grant lands situated such as those herein involved. The Government has, from the early days, always invited and encouraged settlement and occupation of the undisposed of public domain, and, with this end in view, as held by the Supreme Court in the case of *Tarpey v. Madsen* (178 U. S., 215), the law has always dealt tenderly with one who in good faith goes upon public land with a view of making a home thereon.

The State may take indemnity for these lands in the event of the approval of the townsite entry and, in so doing, may select lands anywhere within her borders; unless the townsite settlers can receive the particular lands which have been occupied by them for so many years, they can take nothing, because they have no right of lieu selection.

It is believed that the provision of the law granting indemnity to the State, where the school sections are found upon survey to have been otherwise disposed of, contemplated, among other cases, just such cases as this, and your decision refusing to recognize the State's title under the school grant must be affirmed.

STATE SELECTIONS--NONMINERAL AFFIDAVIT--EXAMINATION WITHIN
THREE MONTHS.

STATE OF SOUTH DAKOTA.

The nonmineral affidavit required by the regulations of April 25, 1907, to be filed in connection with State selections, must be based upon examinations made within three months from the date of the selection.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 20, 1909.* (S. W. W.)

The State of South Dakota has appealed from your office decision of February 18, 1908, holding for cancellation its indemnity school selections embraced in lists Nos. 15, 16 and 17, of the E. $\frac{1}{2}$ of section 19, and all of sections 20 and 21, T. 109 N., R. 78 W., Pierre land district.

It seems that the lands involved were selected by the State as school indemnity under date of November 17, 1902, per list No. 9, which said selections were held for cancellation by your office decision of November 22, 1907, for want of sufficient valid base, permission being given the State, upon proper election, to retain such portion of the selections, not in excess of the actual loss of school land, on the base offered.

No appeal was taken from your said decision of November 22, 1907, but, instead, the State filed new selections, embraced in lists Nos. 15, 16 and 17, above mentioned, upon entirely different bases; and in your office decision of February 18, 1908, the selections embraced in list No. 9 were canceled, and the selections embraced in the new lists were held for cancellation, for the reason that they were filed at a time when the land was not subject to selection, being embraced at that time in the former list No. 9.

Attention was also invited by your said decision of February 18, 1908, to the defective non-mineral affidavit, in that the same was based upon a personal examination made of the land in 1902, and not within three months of the date of the filing of the lists.

The State alleges in its appeal that your office erred in construing the second part of rule number thirteen of the regulations governing state selections, approved April 25, 1907 (35 L. D., 537); and also in

requiring that a non-mineral affidavit should be based upon an examination made within three months of the filing of the list.

Paragraph thirteen of the regulations above mentioned plainly provides that no application will be allowed for lands covered by an existing selection or entry, nor will any rights be recognized as initiated by the tender of such application, and, further, that no amendment will be allowed of any indemnity school land selection by the substitution of new base, in whole or in part, in place of that originally tendered, defective from any cause.

From what has been stated, it will be seen that list No. 9, though held for cancellation by your office on November 22, 1907, was not actually canceled until February 18, 1908, while the lists under consideration were filed in the local land office January 28, 1908; therefore, whether the lists Nos. 15, 16 and 17 were intended as new selections, or were offered by way of amendment to the substituted bases for the original list No. 9, it was irregular on the part of the local office to allow them.

However, as it appears from the appeal that the State was misled by the action of the local officers in a previous similar case, and as there is nothing in the record indicative of a want of good faith on the part of the State, the selections may be permitted to stand, in the absence of any intervening claim, and upon condition that new non-mineral affidavits be furnished within sixty days from notice hereof. Unless such new non-mineral affidavits are furnished by the State within the time specified, your office will be justified in cancelling the selections.

It is true, as suggested by the State, that the regulations of April 25, 1907, do not specifically provide that the non-mineral affidavits required must be based upon examinations made within three months of the date of the filing of the lists; but it is understood that this rule is observed in your office, upon the theory that a person who has not seen the land concerning which he is to make affidavit, for more than three months, can not possibly be informed as to whether the land is occupied at the date of such affidavit, or whether or not mineral has been discovered thereon since the time he last saw the same. This rule of your office seems to be reasonable, and will not, therefore, be disturbed by the Department.

As modified herein, your decision is affirmed.

JOHN S. TENDICK.

Motion for review of departmental decision of December 1, 1908, 37 L. D., 332, denied by First Assistant Secretary Pierce, February 25, 1909.

SECOND CONTEST—COLLUSION—PREFERENCE RIGHT.

TAYLOR ET AL. *v.* GRAVES (ON REVIEW).

Where a contest is filed in collusion with an entryman for the sole purpose of gaining time to sell a relinquishment and obstruct a possible later contest, and prior to the consummation of the collusive scheme a second contest is filed charging such collusion and the entryman's failure to comply with law, and at a hearing duly had after notice to all parties the allegations of the second contest are sustained, the second contestant is entitled to a preference right of entry, notwithstanding a prior application to enter filed on relinquishment of the entry under attack and with knowledge of the second contest.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 25, 1909.* (G. C. R.)

September 7, 1907, the Department (36 L. D., 80) affirmed the action of your office and the local office as "without error," awarding to Charles M. Graves the preference right to enter the NE. $\frac{1}{4}$, Sec. 29, T. 21 N., R. 22 W., I. M., Woodward, Oklahoma.

George F. Marston filed a motion for review. The same was considered and on April 20, 1908, entertained by the Department. Thirty days were allowed to serve the opposite party with copy of motion, arguments therein, etc. These were duly served and answers thereto have been filed.

The facts as set forth are not disputed but it is contended that the same do not under the law justify the holding that Graves and not Marston is entitled to make entry of the land.

Eliminating the names of certain parties and their acts with relation to the land, said parties not now connected with the case, the facts briefly stated are as follows:

October 17, 1900, Bessie Sawyer made homestead entry for the land. July 30, 1903, Michael C. Sawyer, father of said Bessie, filed a contest against the entry alleging that the said Bessie had married one Frank T. Watson, with whom she was then living, and that she had abandoned the land.

September 27, 1903, Charles M. Graves filed a contest against the entry, alleging abandonment and also that Sawyer's contest was not made in good faith but was speculative, etc.

October 26, 1903, Michael C. Sawyer submitted testimony under his contest, the entryman, then Mrs. Watson, making default. No action was taken thereon by the register and receiver.

February 14, 1904, Sawyer dismissed his contest, waived preference right, and filed Bessie's relinquishment of her said entry. At the same time George F. Marston applied to enter the land.

March 19, 1904, Charles M. Graves applied to enter the land, alleging his superior right thereto as against Marston.

A hearing was ordered. All parties in interest were notified and all were present at the hearing.

The testimony, as found by three tribunals, shows, in substance, that Sawyer's contest against his daughter's entry was brought not in good faith to obtain a preference right but to gain time to enable his daughter, her husband, or himself, to sell a relinquishment of the entry; that efforts were made to sell the relinquishment and that a purchaser was at last found in Marston, who agreed to pay therefor \$450, provided he was allowed to make entry of the land. He placed \$250 in bank for that purpose, and agreed to pay the balance in two years on conditions named.

At the hearing Graves proved both abandonment and collusion.

Sawyer, his daughter, Mrs. Watson, and Marston, all knew at the time the relinquishment was filed that Graves's contest had been filed alleging collusion and abandonment. Marston admitted that the filing of the relinquishment was hastened by reason of the second contest, adding that he was told that "it would be dangerous to wait on account of these other contests for someone else might get in ahead of us."

The relinquishment, while it may not have been directly induced by the second contest, was indirectly brought about by it—certainly it was hastened by it, for Marston so stated.

To hold under these circumstances that Marston has the better right to the land is to encourage collusive contests and keep alive illegal entries in order, as clearly shown in this case, that an entryman may speculate in Government lands. This the Department will not knowingly permit.

Where it clearly appears that a contest is filed in collusion with an entryman for the sole purpose of gaining time to sell a relinquishment and obstruct a possible later contest, and it further appears before such a scheme is consummated a second contest is filed, alleging such collusion and the entryman's abandonment, and a hearing duly had with notice to all parties sustains the allegations of the second contest, the second contestant should be given a preference right.

In *Huffman v. Milburn et al.* (22 L. D., 346) it is held (syllabus):

The right of a second contestant to be heard, who alleges the collusive character of the prior contest in addition to his charge against the entry, cannot be defeated by a subsequent intervening entry made on relinquishment of the entry under attack, and with notice of the second contest.

After due consideration of all that is stated in support of the motion, the Department finds no sufficient ground for disturbing the actions hitherto taken.

The motion herein must be, and it is hereby, overruled.

PUBLIC LANDS—ARKANSAS SUNK LANDS—SURVEY.

ARKANSAS SUNK LANDS (ON REVIEW).

Departmental decision of December 12, 1908, holding that the unsurveyed "sunk lands" in the basin of the St. Francis River, State of Arkansas, are public lands of the United States, adhered to on review.

The order in that decision directing the survey of such lands with a view to disposal thereof under the public land laws, does not contemplate the correction of any of the lines of the former survey which may have been properly surveyed, and if any of the meandered lines of that survey are found actually to extend to the edge of permanent bodies of water they will not be disturbed.

The disposition of the public domain lies within the exclusive jurisdiction of Congress, which alone has the power to declare how the United States may be divested of its title; and unless title is passed by reason of the operation of some law of Congress, or by the authorized act of some official done in accordance with the direction of some act of Congress, it still remains in the government, and no mere declaration or expression of opinion by any officer of any of the executive departments can operate to divest such title.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, February 27, 1909.* (S. W. W.)

The Chapman and Dewey Land Company and Chapman and Dewey Lumber Company have filed a motion for review of the Department's decision of December 12, 1908 (37 L. D., 345), directing the survey of the unsurveyed lands in the basin of the St. Francis River, Arkansas, commonly known as the "Sunk Lands."

In that decision it was held that lands lying beyond the exterior lines of the adjoining surveyed townships were public lands of the United States and that neither the claim of the Chapman and Dewey Land Company as riparian owners nor the claim of the St. Francis Levee District, transferee of the State under the swamp land grant, should prevent or interfere with the assertion by the United States of its claim in and to said lands.

As grounds for review the movants urge:

1. It is respectfully urged that the United States has, by long acquiescence (from 1850 to December 12, 1908) of this Department in the correctness of the original surveys made under its direction and with its approval, and by former rulings of the Secretaries of the Interior affirming the correctness of such surveys, become estopped to deny their correctness, as against all who have purchased lands relying upon such surveys, such acquiescence of this Department therein and such rulings of the Secretary thereon.

2. It is respectfully urged that the unbroken line of rulings of this Department, beginning in 1894, and continuing uninterruptedly until December 12, 1908, all declining to survey on the ground that the original surveys, plats and field notes and patents issued with calls therein for such plats and surveys, were in fact correct, and that the United States had parted with all its title to these so-called "Sunk Lands," in favor of riparian owners claiming under such patents of fractional sections properly meandered on water of "Sunk Lands"

as shown on such plats, all made as to the identical townships covered by the order of December 12, 1908, has now after so great a lapse of time become *res adjudicata* and a rule of property.

3. It is respectfully urged that said order is too general and sweeping in its terms to be equitable or just to private rights of property and present enjoyment of such rights, and in terms impliedly admits that a considerable portion of the territory covered by the order ought not to be surveyed. Such order *inter alia* states "it is now quite certain that beyond the meandered lines of the several townships as surveyed between 1845 and 1849 there were at the time of the public survey *many acres* of land entirely uncovered by water, or perhaps subject to periodical overflow, but not covered by a permanent body of water."

The fact that the Honorable Secretary says *many acres* were in the above condition, clearly impliedly states that some acres were covered by a permanent body of water, and were therefore correctly meandered on such permanent bodies of water.

In connection with this motion the Department has considered a petition addressed by Senator Jeff Davis, of Arkansas, to the President on February 8, 1909, and referred to the Department, requesting that action be taken looking to the relief of certain of his friends and among them Mr. Williams, of Forrest City, Arkansas, who, it is alleged, bought from the St. Francis Levee Board a large portion of the unsurveyed lands, paying therefor the sum of one hundred and fifty thousand dollars. In this petition it is claimed that the purchase was based upon the repeated assurances of the Department that the Government claimed no title to the land, but that it was owned by the St. Francis Levee Board under the swamp land grant of 1850.

As held in the decision under review, no lands lying beyond the exterior lines of the surveys which were made at various dates from 1845 to 1849 passed to the State of Arkansas by virtue of the selections made of the surveyed adjoining tracts. Such is the express view taken of this question by the Supreme Court of the State of Arkansas in the recently decided case of *Little v. Williams et al.* (113 Southwestern Rep., 340), where the court said:

A conveyance of the township "according to plat of the surveys" does not include lands which do not appear on the plat of the surveys. We do not mean to hold that unsurveyed lands could not have been selected as swamp lands and patented to the State by the use of proper descriptive terms in the patent, but this was not accomplished by reference to township sections or parts thereof according to the plat of the surveys when the unsurveyed land did not appear on the plats at all. The plats showed it to be water and not land.

The discussion is thus reduced to a consideration of the question of the riparian rights acquired by the purchase from the State of the surveyed fractional subdivisions shown by the plats as bordering on water. If there were no mistakes in the survey and permanent bodies of non-navigable waters were properly meandered, the owners of the meandered tracts would be entitled to all additions resulting from accretion or reliction. *Hardin v. Jordan*, 140 U. S., 371; *Mitchell v.*

Smale, 140 U. S., 406. If, on the other hand, the surveyors were mistaken and there were at the time of the survey many acres of land beyond the meandered line entirely uncovered by water, or perhaps subject to periodical overflow, but not covered by permanent bodies of water, in that event purchasers of the fractional tracts bounded by the meander line would not be entitled to the lands excluded from survey. *Niles v. Cedar Point Club*, 175 U. S., 300; *Kean v. Calumet Canal and Improvement Co.*, 190 U. S., 452.

That there are now thousands of acres of land lying between the meandered lines as surveyed between 1845 and 1849, and the boundaries of bodies of water, is beyond question; and there can be little doubt that such was the case at the time of the surveys. Evidence to this effect was introduced at the hearing had before the Department during the past summer, and similar evidence, sufficient to convince the court, was presented in the case of *Little v. Williams*, *supra*, where it was stated that at some points the bank of the lake was over a mile from the surveyed meandered line. The present well-defined banks of the lake, the character of the timber growing on the land lying between the lake and the surveyed meandered lines satisfied the court that the land in dispute was not a portion of the lake at the time of the survey.

Assuming the correctness of these findings of fact, which confirm in every respect the report of the inspector of the land department, it is not believed that anyone will seriously contend that there was no mistake in the surveys. That the Government is bound by these incorrect surveys and may not take action to correct mistakes involving interests of such magnitude is obviously untenable.

Apparently realizing that the legal title to these so-called "Sunk Lands" is still in the United States and that the Government has a right to correct the surveys and dispose of the lands, the riparian claimants in their motion for review, and the purchasers from the Levee Board through their petition to the President, urge that the Government, because of two letters written by former Secretaries of the Interior, is equitably estopped from now asserting title to the land. Indeed, so much stress is laid upon these two letters that it is deemed advisable to consider their character and the circumstances under which they were written, to the end that their meaning may be understood and their effect properly determined.

The first letter was written by the Department in August, 1894, and was in answer to a communication from the Chief Engineer of the St. Francis Levee District calling attention to the numerous overflows covering the territory embraced within the sunken lands and the necessity and advisability of determining the ownership of the lands in order that they might make their proper return to the St. Francis District.

It must be remembered that at that time and upon the record then existing, the United States had no interest in these lands either actual or potential, present or prospective. They are now shown to be lands that had been returned by early surveys as embraced within permanent bodies of water and the integrity of these surveys had never been attacked in any formal manner. If the lands were in fact, as then appeared, a part of a permanent body of water, it was immaterial to the United States whether that body was a navigable body of water or merely a shallow pond. In either event the United States had no interest. If the lands bordered upon navigable bodies of water they passed to the State by reason of her sovereignty, and if the bodies of water were not navigable but merely shallow ponds or lakes, under repeated adjudications, the disposal of the lands bordering on the water would have passed title to the adjacent lands lying under the water. If, on the other hand, there had been mistakes in returning the lands as covered by permanent bodies of water and the lands in fact had not been so covered but were swamp lands, they would have belonged to the State under its swamp land grant. So, as stated, the United States in 1894 had no interest in the matter in any aspect of the case.

The year following, however, an agreement was concluded between the United States and the State of Arkansas which involved an adjustment of the state swamp land grant. This agreement was ratified by the act of April 29, 1898 (30 Stat., 367), and by the said agreement the State relinquished to the Government all claim under its swamp land grant to lands not theretofore embraced in the approved lists or patents or confirmed to it. The interests of the United States therefore, if any there be, arise under, through and by reason of this agreement or compromise as a result of which if these lands were in fact swamp and would have passed to the State under the swamp land grant of 1850, not having been embraced within the classes of lands saved to the State by compromise, they returned to the United States as a result of the compromise act. From this it will be seen that prior to 1898 at least there was no obligation upon the United States to administer upon the lands, nor can it be said to be in laches in any sense for failing to assert an interest therein.

Following the passage of the act of 1898, *supra*, no definite action seems to have been taken either to attack the integrity of the original surveys or to assert an interest in the lands. Nor does it appear that anything was said or done regarding the matter until the letter of November 17, 1902, was written by Secretary Hitchcock.

In that letter it was said:

As these lands had not been patented, approved or confirmed to the State and had not been sold by the State to any person, except perhaps one tract which it is alleged had been sold prior to said agreement (meaning the com-

promise), the St. Francis Levee District cannot sustain its claim to said land under the swamp land grant, and unless the title of the Government has been otherwise divested or its right to said land was concluded by the approval of the township surveys and the disposal of the adjacent lands, the action of the St. Francis Levee District in disposing of said lands is without warrant or authority, and steps should be taken to enjoin it from disposing of the same and its purchasers should be enjoined from cutting the timber thereon.

That letter then proceeds to inquire as to the real status of the lands at the time of the government survey, stating that the returns of the township surveys showed upon their face that what are now alleged to be unsurveyed portions of said township were, at the time of the survey, actual bodies of water and properly meandered as such, and that there was nothing in the report of the special agent, through which the matter had been called to the attention of the Department, or in any of the papers submitted therewith to impeach the returns as to the physical conditions of the land and water at the time of the survey.

It was because of this fact, namely, the want of sufficient evidence to satisfy the Department that there had been a mistake in the survey, that the Department refused to assert jurisdiction over the lands.

It should be observed that the letter of November 17, 1902, was not in any sense an adjudication of the matter involved. On the other hand, it was merely an expression of an opinion to the Commissioner of the General Land Office that sufficient evidence had not been adduced to satisfy the Department that there had been mistakes in the original surveys.

However, as shown hereinabove and as also appears from the decision of the Supreme Court of the State of Arkansas in the case of *Chapman and Dewey Land Company v. Bigelow* (92 Southwestern Reporter, 534; 206 U. S., 41), there was an unquestioned mistake made in the alleged meander line shown upon the original plat of survey. Indeed, it is no longer a disputed fact, and one of the chief reasons assigned by the movants and by the purchasers from the Levee Board, namely, the magnitude of the interests involved, constitutes also additional evidence of the extent of the mistake made by the surveyors.

The disposition of the public domain lies within the exclusive jurisdiction of Congress who alone has power to declare how the United States may be divested of its title. From this it follows that unless title has passed out of the United States by reason of the operation of some law of Congress, or by the authorized act of some official done in accordance with the directions of some act of Congress, it still remains in the Government and no mere declaration or expression of opinion by any executive officer of any of the departments could operate to divest such title.

It is not believed that there is any such thing as estoppel against the United States in the absence of express statutory provision to that effect. Nor does it appear from the circumstances of this case that

any action has been taken by the Government through any of its officers which should operate as an equitable estoppel. Had the riparian claimants purchased fractional tracts soon after the surveys were made, believing that they actually bordered on the water and without knowledge of the fact that they did not so border on the water but were separated therefrom by no inconsiderable extent of land, they might in that event assert with some reason that they had acquired thereby equitable rights which should not now be disturbed. But such is not the case. The purchase was made comparatively recently with full knowledge of the existing conditions.

The argument that litigation will follow any attempt on the part of the Government to assume jurisdiction and now survey the lands loses much of its force when it is remembered that twice recently questions affecting the title to these lands has been the subject of decisions by the Supreme Court of the State. In the case of Chapman and Dewey Land Company *v.* Bigelow, *supra*, where suit was brought by the riparian claimants against persons claiming portions of the "Sunk Lands" by virtue of independent purchase thereof, the court held that the plaintiffs must succeed, if at all, on the strength of their own title and not on the weakness of their adversary's, and the decree of the chancery court dismissing plaintiff's bill to quiet title was affirmed. In that case the letter from Secretary Hitchcock, written to the Commissioner of the General Land Office on November 17, 1902, was offered in evidence but was excluded. The case was taken by writ of error to the Supreme Court of the United States where it was dismissed for want of jurisdiction. The Supreme Court held, however, that the said letter was clearly *res inter alios* and properly rejected.

In the case of Little *v.* Williams *et al.*, the suit was brought by a person claiming swamp lands by virtue of a purchase from the St. Francis Levee Board against persons claiming by virtue of riparian ownership. In that case also the Supreme Court held that the plaintiff must succeed, if at all, upon the strength of her own title and not upon the weakness of her adversary's; and the decree of the chancery court dismissing the plaintiff's bill to quiet title was affirmed.

From this it will be seen that the Supreme Court of Arkansas in the case of Chapman and Dewey Land Co. *v.* Bigelow decided that the riparian claimants did not acquire title to the "Sunk Lands" by virtue of their purchase of the fractional tracts bordering on the meander line, and the same court also decided that the purchasers of a portion of the "Sunk Lands" opposite the fractional subdivision did not acquire such title as could be sustained in a suit where the plaintiff must depend upon the strength of his own title.

But one conclusion can be reached from these two decisions, namely, that the title to the "Sunk Lands" is still in the United States. The

Department fully accords with that conclusion, and the motion for review must be denied.

In regard to the movants' suggestion that the order of December 12, 1908, directing the survey of the lands, was too broad in that statements are contained therein which impliedly admit that in some instances permanent bodies of water were actually meandered, it may be stated that the order directing the survey does not contemplate the correction of any lines which were properly surveyed, and if it should be found that some of the meandered lines of the old survey were actually extended to the edge of permanent bodies of water, such lines will not be disturbed.

SCHIRM-CAREY AND OTHER PLACERS.

Motion for review of departmental decision of December 29, 1908, 37 L. D., 371, denied by First Assistant Secretary Pierce, February 27, 1909.

RECLAMATION OF LANDS ENTERED SUBJECT TO ACT OF JUNE 17, 1902.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., February 27, 1909.

Reclamation of lands entered subject to the provisions of the reclamation act. To establish compliance with the clause of the reclamation act that requires reclamation of at least one-half of the irrigable area of an entry made subject to the provisions of the act, entrymen will be required to make proof showing that the land has been cleared of sagebrush or other incumbrance and leveled, that sufficient laterals have been constructed to provide for the irrigation of the required area, that the land has been put in proper condition and has been watered and cultivated, and that at least one satisfactory crop has been raised thereon.

Reclamation of lands in private ownership. The express purpose of the reclamation act is to secure the reclamation of arid or semi-arid lands and to render them productive, and section 8 declares that the right to the use of water acquired under this act shall be appurtenant to the land irrigated and that beneficial use shall be the basis, the measure and the limit of the right. There can be no beneficial use of water for irrigation until it is actually applied to reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing of actual growth of a crop. The requirement as to reclamation imposed upon lands under homestead entries shall

therefore be imposed likewise upon lands in private ownership, namely, that the land owner shall reclaim at least one-half of the total irrigable area of his land for agricultural purposes, and no right to the use of water for such lands shall permanently attach until such reclamation has been shown.

Delinquency. Under section 5 of the Reclamation Act—

A failure to make any two payments when due shall render the entry subject to cancellation with the forfeiture of all rights under this act, as well as of any moneys already paid thereon.

This provision evidently states the rule to govern all who receive water under any project, and accordingly a failure on the part of any water-right applicant to make any two payments when due shall render his water-right application subject to cancellation with the forfeiture of all rights under the Reclamation Act, as well as of any moneys already paid to or for the use of the United States upon any water right sought to be acquired under said act. In the case of one who has made homestead entry subject to the terms of the Reclamation Act the entry shall be subject to cancellation in case of such delinquency in payment, whether or not water-right application has been made by him.

Operation of sub-laterals. The control of operation of all sub-laterals constructed or acquired in connection with projects under the reclamation act is retained by the Secretary of the Interior to such extent as may be considered necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled.

JAMES RUDOLPH GARFIELD,
Secretary.

SCHOOL LANDS—NATIONAL FOREST—SECTION 10, ACT OF FEBRUARY 22, 1889.

BLACK HILLS NATIONAL FOREST.

If the Black Hills National Forest is a permanent reservation for national purposes within the meaning of section 10 of the act of February 22, 1889, sections 16 and 36 therein are by the express terms of said act excepted from the grant for school purposes made to the State of South Dakota by said section 10; and if, on the other hand, said national forest is only a temporary reservation within the meaning of that act, the title of the State under its grant will not attach to the sections 16 and 36 therein so long as the reservation exists, in view of the fact that the lands were unsurveyed at the time the reservation was established. During the continuance of the reservation, therefore, lands in sections 16 and 36 therein may be administered by the Forest Service in all respects as other lands in the reservation.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, March 1, 1909.* (S. W. W.)

November 4, 1908, the Acting Secretary of Agriculture submitted supplemental list, No. 1479, embracing lands in the Black Hills

National Forest, South Dakota, requesting that said lands, which contain 46 acres, be opened, in accordance with the provisions of the act of June 11, 1906 (34 Stat., 233). This list was submitted with the understanding that the lands described therein are not to be declared open to entry unless this Department should hold, in view of the decision in the case of the State of South Dakota *v.* Riley (34 L. D., 657), that unsurveyed lands in South Dakota, included within the limits of a national forest, which are afterwards found to be a portion of section 16 or section 36, shall constitute a part of such forest notwithstanding the grant to the State made by section 10 of the enabling act of February 22, 1889 (25 Stat., 676).

It thus appears that, while there is presented a concrete question of the right to dispose of this particular tract of land under said act of 1906, the Department of Agriculture also desires the views of this Department as to whether or not lands, which were unsurveyed at the time of the creation of the national forest, if, upon survey, are found to embrace sections 16 and 36, constitute a part of said national forest, or whether title to such lands vested in the State, upon survey, under the grant made by the enabling act for the support of common schools.

It appears that the lands involved herein are embraced within the limits of the Black Hills National Forest as created, September 19, 1898. The subdivisional surveys were executed in the field, from July 1 to November 18, 1903, and the plat, which was approved, May 16, 1905, was filed in the local land office on September 4 of that year.

It is provided in section 10 of the act of February 22, 1889, *supra*:

Upon the admission of each of said States into the Union, sections Nos. 16 and 36 in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of an act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations, of any character, be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands been restored to and become a part of the public domain.

Section 11. . . . and such lands shall not be subject to preemption, homestead entry, or any other entry, under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

It will be seen that section 10 plainly provides that the sixteenth and thirty-sixth sections in permanent reservations for national pur-

poses shall not at any time be subject to the school grant, and that such sections in temporary reservations shall not be subject to the school grant until the reservations shall have been extinguished and the land restored to the public domain.

Section 11, on the other hand, expressly provides that the school sections shall not be subject to preemption, homestead, or other entry, whether surveyed or unsurveyed, but shall be reserved for school purposes.

However, in this connection, it becomes necessary to consider the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes to read as follows:

Sec. 2275. Where settlements, with a view to preemption or homestead, have been or shall hereafter be made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township or fractional township containing a greater quantity of land than three-quarters

of an entire township, one section; for a fractional township containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter section of land: *Provided*, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named to compensate for deficiencies of school land in fractional townships.

As thus amended, section 2275 materially modifies both section 10 and section 11 of the enabling act of 1889, *supra*. The former section is modified in that the indemnity to be selected may be taken anywhere within the limits of the State, and further that where school sections are embraced in temporary reservations, it is made the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain by protraction or otherwise the number of townships that will be embraced in any temporary reservation, and thereupon the State shall be entitled to select indemnity to the extent of two sections for each township, in lieu of sections 16 and 36, and section 11 of the enabling act is so modified that by settling on a school section prior to survey of the land in the field, a homesteader may defeat the right of the State to that portion of the school section settled upon, and the State is relegated to the taking of indemnity therefor. It will thus be seen that while additional advantages are afforded the States by the amendatory act of 1891, some restrictions are also imposed on the States by the amendatory law.

This Department has repeatedly held that a State admitted into the Union, under the said act of 1889, acquired no rights to lands in sections 16 or 36, prior to the survey. (See *State of Washington v. Kuhn* (24 L. D., 12); *Todd v. State of Washington* (24 L. D., 106); *South Dakota v. Riley* (34 L. D., 657); *South Dakota v. Thomas* (35 L. D., 171). In these decisions it is announced positively that the provisions of the act of February 22, 1889, wherein they conflict with sections 2275 and 2276, Revised Statutes, as amended, are superseded by the provisions of said amended sections, and that the grant of the school lands, provided for in the act of 1889, must be administered and adjusted in accordance with the later legislation.

The very language of the act of 1891 shows that Congress contemplated that the claims of the States to said sections 16 and 36 might be defeated by reason of other disposition being made of the same, because provision is made for indemnity in the event that said sections are included in any national reservation, or are otherwise disposed of, clearly showing that Congress, or the executive departments, under authority of Congress, might make some other disposition of the land. The act of 1891, amending sections 2275 and 2276, while

restricting in some respects the grants made by the prior act of 1889, also conferred additional privileges upon the States in connection with these grants; for example, by the terms of the amendatory law, the States are not confined in the selection of indemnity lands to tracts contiguous as may be to the lands lost in place, but the States may take such indemnity anywhere within their limits. The States, having availed themselves of such privileges, and others granted by the amendatory legislation, must also accept any restrictions imposed thereby.

The act of admission, with its clause respecting school lands, was not a promise by Congress that, under all circumstances, either then or in future, the specific school sections were or would become the property of the State, because the possibility of other disposition was contemplated and due provision made therefor. The right of Congress to make such other disposition was clearly recognized in the act, and, at the same time, provision was made for the selection of indemnity under such circumstances. In *Minnesota v. Hitchcock* (185 U. S., 373), the court refers to the act of February 28, 1891, and in no way questions its validity.

Moreover, as shown above, the act of admission expressly provided that sections 16 and 36 embraced in permanent reservations for national purposes should not be subject either to the grants or the indemnity provisions of the act; and, further, that no lands embraced in Indian, military or other reservation of any character should be subject to the grants or the indemnity provisions until the reservation shall have been extinguished.

Therefore, conceding, but not deciding, at this time, that national forests are permanent reservations for national purposes, as may possibly be inferred from the language of the first section of the aforesaid act of June 11, 1906, and, as may also be inferred from the language employed by Congress in making appropriations for the support of forest reserves, which, it is declared, shall hereafter be known as national forests, it follows that the 16th and 36th sections were expressly excepted from the grant made to the State by the enabling act. If, however, it be assumed that a national forest constitutes only a temporary reservation but, as in this case, was created prior to the survey of the land, it follows from the enabling act of 1889, as amended by the act of 1891, *supra*, that the State's title does not attach until the reservation is extinguished and the land restored to the public domain. As long, therefore, as the reservation exists, land in the 16th and 36th sections may be administered by the Forest Service in all respects as other lands in the reservation are administered and the State may not interfere therewith.

However, in the case under consideration, it appears that one Jacob Thompson settled on the land, May 23, 1902, under a contract of

purchase entered into with one Timothy D. Coleman, a squatter, and maintained continuous residence and cultivated the land until February 10, 1906, when the said Coleman, by suit upon the contract, had in a local court, obtained a decree for Thompson's removal from the land by the county sheriff. It will thus be seen that Thompson's settlement was initiated after the creation of the Black Hills National Forest but prior to the survey of the land.

In your office report of December 2, 1908, submitted upon this matter, it is stated that the land applied for is situated in Lawrence County, respecting which it is provided by section 4 of the act of June 11, 1906, that no homestead settlements or entries shall be allowed except to persons occupying lands therein prior to January 1, 1906. This provision of the act as construed by your office contemplates a settlement established prior to January 1, existing on that date and continued to the date of application, and as, in the judgment of your office, Thompson's claim does not meet this requirement of the law, you recommend that his application, upon which the land was listed by the Department of Agriculture, be denied.

The Department cannot adopt this view of the case. Thompson is shown to have been a settler on the land prior to the survey, and, in the absence of a forest reservation, such settlement of itself would have operated to defeat the State's title. Thompson's alleged contract with Coleman need not be considered because the latter, having only a squatter's right, could make no contract which would in any way be binding on the Government. True, Thompson did not present his application for entry within ninety days after the filing of the plat of survey, but the land at that time was a part of the forest reservation and his failure to present his application for entry might be justified by reason of that fact.

In the opinion of your office the fact that Thompson was removed from the land by order of the court on February 10, 1906, constituted an abandonment or extinguishment of his claim, but this is plainly contrary to the well-recognized rule that absence under duress does not constitute abandonment. Whether Thompson was actually removed from the land does not appear. The letter from the Acting Secretary of Agriculture merely states that a decree for his removal by the sheriff was secured, but that is altogether immaterial. He was a settler prior to survey and continued to reside on the land until after the passage of the act of 1906. By reason of his settlement prior to survey he secured a right superior to that of the State and, by reason of the act of 1906, he may, if qualified and under proper conditions, be allowed to enter land within a national forest.

It is so ordered and your office will take the necessary action to carry these instructions into effect.

SOLDIERS ADDITIONAL—REMARRIED WIDOW—SECTION 2307, R. S.

JOHN D. INGRAM.

The widow of a soldier who made homestead entry in her own right for less than 160 acres and remarried prior to the adoption of the Revised Statutes is not entitled to an additional entry under the provisions of section 2307 of the Revised Statutes, notwithstanding she may again have become a widow and was unmarried at the date of the adoption of such statutes.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, March 1, 1909.* (J. R. W.)

Delilah Tuttle, formerly widow of Benjamin Bratton, and John D. Ingram, her assignee, each appealed from your decision of December 22, 1908, rejecting Ingram's application under sections 2306 and 2307 of the Revised Statutes to enter the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, T. 2, R. 30 E., N. M. M., Roswell, New Mexico.

Benjamin Bratton rendered the requisite military service in Co. E, 76 Illinois Infantry Volunteers, from August 22, 1862, to his death March 18, 1863. June 4, 1868, Delilah Bratton, his widow, in her own right as head of a family, made entry for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 17, T. 62 N., R. 18 W., 5th P. M., Boonville, Missouri, canceled by relinquishment December 29, 1875. December 26, 1869, she married Asa C. Tuttle, who died, and was buried March 4, 1877, leaving Delilah his widow, who has not remarried. December 10, 1906, she assigned her right as to forty acres, to Henry N. Copp, who, December 26, 1906, assigned to John D. Ingram, who, August 13, 1907, applied to make the entry in question. On these facts you held that:

At enactment of section 2307 and the act [of April 4, 1872, 17 Stat., 50, and June 8, 1872, 17 Stat., 333], upon which said section was based, Delilah Tuttle was not unmarried, but was the wife of Asa C. Tuttle. An additional right under said section did not exist, as by her marriage she changed her status, becoming the wife of Asa C. Tuttle, and the right not being *in esse*, it could not spring up and Mrs. Tuttle could not be vested as a beneficiary thereof when she became widow of her second husband.

It is assigned for error and argued that as Mr. Tuttle died in 1877, she has since that time been unmarried and competent to exercise the right conferred by the act. The question presented is, whether Mrs. Tuttle became beneficiary of the additional entry provision of section 2307.

The act of 1872, section 1, conferred on a class of meritorious persons, as reward for service rendered, right to enter a full quarter section regardless of whether double minimum or not, with other benefits not here material. Section 2 then provided compensation of an additional right to such persons as had entered a less area than

the full quantity permitted. Some of this meritorious class had died, and section 3 preserved the right to a fixed order of successors, viz: 1. To the widow if unmarried; and, 2, if she were remarried or dead, then to the minor orphan children. The widow took nothing if remarried, and the benefit passed immediately to the children or second class, who take as donees of the statute, and not by inheritance.

Mrs. Bratton made her entry before the statute and as head of a family in her own right as such, not in right of the soldier. In 1869, before enactment of the statute, she remarried and by its terms was without its benefit. If there were minor children, the full benefit passed to them, and entry might have been made, by a guardian, for the full area their father might have made were he living, as they, under section 3, were next in order of succession to their mother then remarried. The statute does not provide that on their failure to exercise the right during minority it shall revert to the remarried widow, if then competent to take.

This is not inconsistent with any published decision cited by counsel or found by the Department. In John M. Maher (34 L. D., 342) it appears that the soldier's widow, Mrs. Herriford, remarried December 11, 1883, so that an additional right, upon the facts of that case, vested in her on passage of the act in 1872, and the same condition of facts existed in Inkerman Helmer (34 L. D., 341), the date of the widow's remarriage being given as April 21, 1889. In John S. Maginnis (32 L. D., 14) the date of remarriage was March 14, 1901. In John C. Mullery (34 L. D., 333) the widow died July, 1887, not having remarried. In Henry S. Kline (36 L. D., 311) the widow remarried prior to the statute and so remained to her death. The case is decisive of the present one.

Your decision is affirmed.

**CONFLICTING APPLICATIONS—PREFERENCE RIGHT OF SETTLER—
PRACTICE.**

CLARK ET AL. v. SMITH.

The provision of section 3 of the act of May 14, 1880, according to persons who settle upon public lands with the intention of claiming the same under the homestead laws a period of ninety days after the land has become subject to entry, filing and selection within which to file applications to enter, gives a preference right *to the land*, if asserted within that period, but no preference in the order of filing or adjudication of right or claim.

Where the first legal applicant for a particular tract of land after the opening presents a timber and stone declaratory statement therefor, it should not be suspended until the expiration of the ninety-day period to await the assertion of a possible settlement claim for the same land, but should be placed of record and proceeded with in the usual manner, the date for the

submission of proof thereon, however, being set beyond the ninety-day period; and any subsequent applicant for the same land, claiming prior settlement thereon, should be notified of the conflicting timber and stone application and a hearing ordered upon the allegation of prior settlement.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, March 3, 1909.* (G. A. W.)

Hattie M. Clark and Belle Merriam have filed separate appeals from your office decision of February 1, 1908, which affirmed the action of the local officers in the Sacramento, California, land district, permitting Robert O. Smith to make homestead entry of lands in such district against their protest that their timber and stone applications, tendered six days earlier, were prior adverse claims.

Counsel for the homestead entryman protest against consideration of the appeals inasmuch as they were not filed in the local office until five months and two days after the date of the decision appealed from. Action on the appeals was suspended by the Department, and the local officers requested to forward evidence of service of notice of your office decision of February 1, 1908, upon Clark and Merriam. Under date of January 20, 1909, the receiver wrote:

I now report that your letter of February 1, 1908, was served on C. E. Swezy, attorney for * * * Clark and Merriam, and that timely and on July 3, 1908, the appeal of Belle Merriam and Hattie M. Clark was filed in this office.

The appeals will therefore be considered upon their merits.

The land in controversy is in township 6 north, range 15 east, Sacramento, California, land district, which township (formerly a part of the Stanislaus National Forest) was restored to settlement December 14, 1906.

By letter of February 28, 1907, the lands were made subject to entry, filing and selection, on August 15, 1907, the published notice reading:

Notice is hereby given, that on December 14, 1906, the Secretary of the Interior released the following described areas from the temporary withdrawals made on December 24, 1902, and January 23, 1904, for forest reserve purposes, and restored to settlement all the vacant public lands, not otherwise reserved, therein; and that the said lands so restored to settlement on December 14, 1906, will become subject to entry, filing and selection, under the usual restrictions, at the respective United States land offices for the districts in which the released lands lie, viz., Sacramento and Independence, California, on August 15, 1907, etc.

August 15, 1907, Hattie M. Clark offered her timber land application for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 28, T. 6 N., R. 15 E., and later in the same day Belle Merriam tendered a similar application for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 34, and the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 33, same township and range. These applications were held by the local officers, without action, pending

the expiration of the three months' period during which prior settlers on the land are permitted to make entry, etc.

September 3, 1907, Robert O. Smith filed application dated August 21, 1907, to make homestead entry for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, and the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 33, township and range above mentioned, alleging in said application that he made actual settlement upon the land, with the intention of making the same his home, on August 12, 1907, and had been residing thereon since. Smith was permitted to make homestead entry.

The timber land application of Clark is in conflict with Smith's homestead entry as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, while the timber land application of Merriam is in conflict with Smith's entry as to the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 33.

September 14, 1907, the receiver of the Sacramento land office informed Clark and Merriam, by letter, of the conflict between their applications and the entry of Smith. Both appealed from the action of the local officers, urging, among other things, that such officers erred in not filing their timber and stone applications and issuing notice for publication, etc., there being no conflicting claims to the tracts involved on August 15, 1907, the day they presented their applications, which they held were the first legal applications for lands declared by the Department open on that day to entry, *filing* and *selection*. They prayed that their applications be ordered filed as presented, that notice be ordered issued so that they might proceed with said applications according to law, and that Smith be allowed such rights to be heard as properly belonged to him.

By decision dated February 1, 1908, your office affirmed the action of the local officers, therein holding:

Settlers upon the land in question having ninety days after the land became subject to entry, filing and selection within which to file their applications to enter, your action receiving and suspending the timber land applications filed on August 15, 1907, was clearly correct.

* * * * *

As Smith filed his homestead application within the ninety days preference right awarded settlers, which alleged settlement on the land, your action allowing his entry was correct and is hereby affirmed and the timber application rejected as to the land in conflict.

A further appeal brings the case before this Department.

Under section 3 of the act of May 14, 1880 (21 Stat., 140), settlers upon lands with the intention of claiming the same under the homestead laws are accorded ninety days after the land has become subject to entry, filing and selection, within which to file their applications to enter.

The act gives *bona fide* settlers a preference right to the land, if the claim is asserted within a limited period, but no preference in order of filing or adjudication of right or claim. The land here having been

declared open to entry, filing and selection on August 15, 1907, if Clark's and Merriam's timber land applications were properly presented and the first legal applications for the land, they should have been then and there made of record, publication proceeded with, and a day set for the making of proof, which day should have been set far enough in advance to make allowance for the ninety days' preference period. When Smith presented his application to make homestead entry, as it was within ninety days from the date the land was restored to entry, it should have been received and filed and Smith informed of the prior conflicting applications of Clark and Merriam. A hearing should then have been had upon Smith's allegation of prior settlement, to determine the respective rights of the parties.

For the reasons above stated, your office decision is modified. The local officers should be directed to order a hearing, of which due notice should be given all interested parties, and opportunity afforded such parties to present their claims.

OSTREIM *v.* BYHRE.

Motion for review of departmental decision of October 28, 1908, 37 L. D., 212, denied by First Assistant Secretary Pierce, March 5, 1909.

PRACTICE—ORAL ARGUMENT—WHEN ALLOWED.

A. W. LAFFERTY.

While as a rule the department will permit oral argument in contested cases pending before it when requested by both parties, or upon the application of either where the questions involved may affect the public generally, yet in ordinary cases, where only individual interests are involved and the decision to be rendered will affect only the particular case, the party applying for the oral argument must first obtain the assent of the opposing party before his application will be allowed.

First Assistant Secretary Pierce to A. W. Lafferty, Portland, Oregon,
(G. W. W.) *March 9, 1909.* (S. W. W.)

The Department is in receipt of your three letters of February 22, 1909, requesting that the cases of Fred Fogel *v.* Bertha Willis, Victor S. Howard *v.* William R. Ellis, and Bertha Faude *v.* Joseph Kosydar, involving contested homestead entries in the former Siletz Indian Reservation, be set down for oral argument at as early dates as possible, and that due notice thereof be given the parties in interest.

As grounds for your request you state that the value of the property involved in each case is approximately \$10,000, and that the issues are such that they can be more clearly presented and better

understood if oral argument is allowed; that no hardship will be imposed upon the contestants by allowing oral argument, because counsel in Washington fully conversant with the issues involved can be secured at reasonable cost, and that, if necessary, the value of the property and the importance of the questions justify the sending of counsel to Washington to argue the cases.

In reply I wish to say that the Department is always pleased to have all cases pending before it discussed as fully as possible, both by brief and oral argument, and to that end oral argument is seldom, if ever, denied whenever both parties in interest request it, and if questions are involved the determination of which may affect the public generally, oral argument is usually allowed upon application of either party to the controversy.

However, in ordinary cases of contested entries where only individual interests are involved and the decision to be rendered is usually dependent upon the facts of each case, the Department is not disposed to impose the expense of a long journey or the employment of additional counsel in Washington upon parties who are unwilling or indeed who may be unable to undergo such additional expense. In such cases oral argument is usually allowed only upon the request of both parties—not because of unwillingness to hear and consider any argument that counsel may wish to present, because, as above stated, the Department is always pleased to afford litigants every opportunity in the presentation of their cases, but on account of consideration which it is believed is due those parties who may not desire to undergo the additional expense necessarily incident to an oral argument.

If, therefore, you will procure the assent of the opposing parties, the Department will be pleased to grant your application.

PRIVATE LAND CLAIM—JURISDICTION OF LAND DEPARTMENT.

SANTA TERESA GRANT.

The land department is without authority to pass upon the validity and extent of a private land grant confirmed and surveyed under decree of the Court of Private Land Claims, or to determine as to the validity of the decree and survey, its jurisdiction, after approval of the survey, being limited to the ministerial duty to issue patent, all other matters being solely within the jurisdiction of the courts.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 9, 1909.* (E. F. B.)

This appeal is filed by the owners of a Spanish land grant, lying within the Territory of New Mexico, known as the Santa Teresa

grant, from the decision of your office of August 26, 1908, ordering a hearing for the purpose of determining whether the survey of said grant, made in conformity with a decree by the Court of Private Land Claims, extends into the State of Texas, and to determine "as far as this [your] office can determine it, the true boundary between the State and Territory."

The controlling question at issue is whether your office has any jurisdiction whatever in the premises, either for the purpose of determining any question as to the validity or correctness of said survey, or as to the true boundary between the State of Texas and the Territory of New Mexico, in any proceeding growing out of the confirmation and location of said grant.

The material facts necessary to a clear understanding of the issue presented by the appeal may be very briefly stated.

The Spanish grant known as Santa Teresa was made prior to 1790, and was a valid claim existing at the date of the acquisition of the Territory of New Mexico by the United States from the Mexican government, which the United States, by the terms of the treaty, were bound to recognize and confirm. It was confirmed by decree of the Court of Private Land Claims, created by the act of March 3, 1891 (26 Stat., 854), to adjudicate and determine as to the validity of claims under Spanish or Mexican grants, in the Territory of New Mexico, and other public land States and Territories named therein. A survey of said claim was made in accordance with the decree of confirmation, and was approved by the Court June 14, 1904, as having been made in conformity with the decree, after a hearing upon a protest against the approval of the survey, on the ground that the grant, as surveyed, extended into Texas and covered lands for which persons held patents from the State of Texas.

The significant facts disclosed by this statement are: First, that the Court of Private Land Claims, which has *sole and exclusive jurisdiction to determine whether said survey is in conformity with its decree*, has determined that question, and, second, that no public lands are embraced in that survey and no right to such lands is involved in this controversy.

Your office assumed to exercise jurisdiction in this matter upon the ground that no jurisdiction was vested in the Court of Private Land Claims to determine as to the validity of any Spanish or Mexican grant lying within the State of Texas.

But that is a matter over which your office has no jurisdiction, although the patent, which must be issued in conformity with the approved survey, would be absolutely void as to any lands over which the court had no jurisdiction. Your duty is to issue the patent and leave it to the courts to determine whether any lands embraced

in the approved survey are situated in the State of Texas, according to the recognized boundaries, and whether the decree covers lands over which the court had no jurisdiction. A hearing by your office to determine any such question would be futile, as no decision which might be made by your office could be enforced, whatever may be the result of the hearing.

The act of March 3, 1891, invested the Court of Private Land Claims with exclusive jurisdiction, subject to appeal to the Supreme Court, to determine as to the validity, extent and boundaries of Mexican and Spanish grants in the States and Territories named in the act, so far as concerns the interest of the United States. (*Ainsa v. New Mexico and Arizona Railroad Company*, 175 U. S., 76, 80.)

It provided that, after final decree, it shall be the duty of the clerk of said court to certify that fact to the Commissioner of the General Land Office, with a copy of the decree of confirmation, stating the location, boundaries and area of the tract confirmed, and the Commissioner shall thereupon cause the tract so confirmed to be surveyed at the cost of the United States.

The Commissioner has no power to determine as to the correctness of that survey, or to adjudicate and determine any question whatever. His duties are purely ministerial. He is required to transmit the survey to the court *immediately* upon the receipt thereof, with or without objections thereto, and it is the exclusive province of the court to determine if said survey is in substantial accordance with the decree of confirmation and any objections filed thereto. "When any survey is finally approved by the court, it shall be returned to the Commissioner of the General Land Office, who shall as soon as may be cause a patent to be issued thereon to the conferee." (Sec. 10.)

A somewhat similar question was presented in the case of *Ely's Administrator v. Magee et al.* (34 L. D., 506), in which it was held that your office has no authority to adjudge and determine any question involving the validity and extent of a grant which has been confirmed and surveyed under a decree of the Court of Private Land Claims, and that you are required, by the express terms of the act, to perform the ministerial duty of issuing a patent in conformity with the decree and approved survey.

Any assumption of authority to determine as to the validity of the decree and survey, or the extent of the grant, would be a usurpation of the prerogative and jurisdiction of the court.

The question as to whether your office can exercise jurisdiction for any purpose whatever over lands within the boundaries of a survey of a Mexican or Spanish grant made in conformity with a decree of

confirmation by the Court of Private Land Claims came before the Department in the case of the Brazito Grant (36 L. D., 117). That was an appeal by the owners of the Santa Tomas de Yturvide Colony grant from a decision of your office approving a survey of the Brazito grant, which had been confirmed by act of Congress of June 21, 1860. There was a conflict between the two surveys.

The Department held that your office not only had authority, but that it was your duty, to ascertain the boundaries of the Brazito grant and to approve the survey thereof, although such survey may conflict with the survey of the Colony grant made in conformity with the decree of confirmation by the Court of Private Land Claims, for the reason that the 13th section of the act creating the Court of Private Land Claims provided that "no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress or under its authority," and that the owners of the Brazito grant were entitled to have the boundaries of their grant, as confirmed by the act of Congress, definitely ascertained by an approved survey by your office, leaving the parties to litigate between themselves in the proper forum as to who is entitled to the land in conflict.

In *United States v. Conway* (175 U. S., 60, 69), it was directly held that the Court of Private Land Claims had no right to adjudicate as to the respective merits of claims or titles to lands in conflict:

The duty of the court under section eight, "to hear, try and determine the validity of the same" [the grant] "and the right of the claimant thereto, its extent, location and boundaries," is discharged by determining the extent and validity of the grant as between the United States and the grantee, and it is not incumbent upon the Court of Private Land Claims to determine the priority of right as between him and another grantee. Such private rights are carefully preserved in the eighth and thirteenth sections.

But it does not follow that your office has any authority to determine whether the court exceeded its jurisdiction, inasmuch as you have no jurisdiction over lands lying in the State of Texas, that no public lands are affected by said decree, and no duty is imposed upon your office to determine as to any right growing out of or affected by said decree of confirmation. Your simple duty is to perform the ministerial act of issuing the patent so that all parties who may have any interest therein or be affected thereby may, in the proper forum, litigate as to their respective rights. (*United States v. Baca*, 184 U. S., 653.)

Your decision is reversed.

MINING CLAIM—ADVERSE CLAIM—JUDICIAL PROCEEDINGS.

GYPSUM PLACER CLAIMS.

In determining whether an adverse judicial proceeding has been instituted within the statutory period, the department will not undertake to review an order of a court of competent jurisdiction recognizing the initiation of such proceedings within said period, while the suit so begun is pending within said court.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, March 9, 1909. (F. W. C.) (E. B. C.)

The Marbleite Plaster Company has appealed from your office decision of August 17, 1908 (adhered to on review, October 6, 1908), wherein entry, No. 1300, made by the company May 11, 1908, for the Gypsum No. 2 placer mining claim, embracing the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, and the Gypsum No. 3 placer mining claim, covering the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 28, T. 27 N., R. 32 E., M.D.M., Carson City, Nevada, land district, was suspended to await the filing of the judgment roll in the case of Emmons against the company, now pending in the State district court.

November 20, 1907, the company filed its application for the above named claims, which are therein described as embracing, in addition to the tracts above mentioned, certain adjoining lands to the eastward lying in Sec. 27 of the same township and aggregating in area 140 acres, and on January 27, 1908, adverse claim, No. 344, on behalf of Edward M. Emmons and Louis P. Boardman, was filed, in which they allege their ownership and possession of the Nevada Gypsum lode mining claims, Nos. 1 to 6, inclusive, comprising 120 acres, situated in sections 27, 28, 33 and 34 of the above township, and that the lode claims are prior in right to, and in conflict with, the claims applied for by the company. A copy of a plat, very unartificial in form and not drawn to scale, accompanies the adverse claim. No copies of location certificates or of conveyances or abstract of title were filed with the adverse claim.

May 11, 1908, the company applied to purchase the tracts first above described, and expressly excluded from said application all those portions of its two claims situated in Sec. 27. At the same time there was filed a certificate from the clerk of the State district court, stating that no suit involving the Gypsum Nos. 2 and 3 placer locations claimed by the Marbleite Gypsum Company—

was pending, or had been commenced in said court on the first day of March, A. D. 1908, or at any time prior thereto, other than as follows: That on February 26, 1908, there was received at my office by special delivery letter from L. A. Boardman, Esq., attorney for the plaintiff, a complaint wherein Edward M. Emmons is plaintiff and Marbleite Plaster Company, a corporation,

is defendant, with the request that said complaint be filed and a summons issued thereon. That said complaint was not filed until March 2nd, 1908, at which time said complaint was filed in my office and a summons issued thereon; and said summons thereafter sent by mail to said L. A. Boardman at San Francisco, California. That on April 3rd, A. D. 1908, upon request by letter from said L. A. Boardman, the order, a certified copy of which is attached hereto, was made by Hon. W. H. A. Pike, one of the judges of the said court, and on said date filed in said cause. That thereupon, acting under said order, I erased from the original file marks on said complaint the words "March 2nd" and inserted in place thereof "as of Feb. 26th," so that the file marks on said complaint now read "Filed as of Feb. 26th, 1908," instead of "Filed Mar. 2nd 1908," as it did until April 3rd, A. D. 1908. That on said April 3rd, 1908, the original summons which had been issued on March 2nd, 1908, was returned to me, and by the direction of said L. A. Boardman I then destroyed said original summons, and on said April 3rd, 1908, issued a new summons a copy of which was thereafter served on said defendant.

The order of the court referred to is as follows:

It appearing to the satisfaction of the above entitled court and the judge thereof, that the complaint in the above entitled action, together with all necessary fees was received by the clerk of the above court on the 26th day of February, with instructions from plaintiff to file the same and issue summons thereon, forthwith; that thereafter the said clerk filed the said complaint and issued said summons as of the 2nd day of March A. D. 1908:

It is therefore ordered that the said clerk forthwith file said complaint and issue said summons as of the said 26th day of February, A. D. 1908, the actual day when said complaint was so delivered to said clerk with the aforesaid request and instructions.

Counsel for the company at the same time submitted an extensive brief, in which it was contended that there was no suit or proceeding commenced in court within thirty days after the filing of the adverse claim, for the reason that the complaint in the suit referred to was not in fact filed in time and that no summons was issued in time. They further urged that the showing made in the clerk's certificate was amply sufficient to authorize the allowance of entry. The local officers apparently were of this opinion, and, on the same day, issued final receipt and certificate.

Your office, upon examining the record, declared the entry suspended, deeming the decision in the case of *Catron et al. v. Lewishon* (23 L. D., 20) controlling. The motion for review was filed and counsel therein, in addition to reiterating their contention that no suit was commenced in time, attacked the sufficiency of the adverse claim itself, asserted that it failed to comply with the requirements of the statutes and regulations; that it did not show the nature, boundaries, or extent of the alleged adverse claims, and was vague, indefinite and uncertain and not accompanied by copies of location certificates or abstract of title; that the attempted lode locations were void, being alleged lode locations upon placer deposits; and that the so-called adverse claim raised only an issue as to the character of the

land, whether lode or placer, of which question the land department has exclusive jurisdiction.

Your office denied the motion for review, holding that the case of *Catron et al. v. Lewishon*, *supra*, was sufficient authority for deciding that proceedings were commenced in time to effect a stay of proceedings before the land department, and that the sufficiency of the adverse claim should have been raised earlier in the proceedings, no objection in regard to which, therefore, would now be considered.

The company has appealed, contending that your office decision is erroneous and attacking the same in nine specifications of alleged error.

The Nevada statutes (Cutting's Compiled Laws of Nevada), cited by counsel on behalf of the company and applicable here, are as follows:

3117. Sec. 22. Civil action in the district courts shall be commenced by the filing of a complaint with the Clerk of the Court, and the issuance of a summons thereon; *provided*, that after the filing of the complaint a defendant in the action may appear, answer, or demur, whether the summons has been issued or not, and such appearance, answer, or demurrer, shall be deemed a waiver of summons.

3118. Sec. 23. The Clerk shall indorse on the complaint the day, month, and year the same is filed, and at any time within one year after the filing of the same the plaintiff may cause to be issued a summons thereon. The summons shall be issued and signed by the attorney of the plaintiff, or by the Clerk, and when issued by the Clerk shall be issued under the seal of the court.

* * * * *

3123. Sec. 28. The summons shall be served by the Sheriff of the county where the defendant is found; or by his deputy, or by any citizen of the United States over twenty-one years of age; and, except as hereinafter provided, a copy of the complaint, certified by the Clerk or the plaintiff's attorney, shall be served with the summons. When the summons shall be served by the Sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer, of its service, and of the service of a copy of the complaint, to the office of the Clerk of the county in which the action is commenced. When the summons is served by any other person, as before provided, it shall be returned to the office of the Clerk of the county in which the action is commenced, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant to the action residing within the county in which the action is brought, a copy of the complaint need be served only on one of such defendants.

* * * * *

3724. Sec. 20. An action shall be deemed to be commenced, within the meaning of this act, when the complaint has been filed in the proper court, and summons issued and placed in the hands of the Sheriff of the county, or other person authorized to serve the same.

The case of *Catron et al. v. Lewishon*, *supra*, relied upon by your office, involved an adverse claim on behalf of the placer location against an application for lode claims. The facts here involved are similar to those set forth in that case, with a difference, if any,

rather more unfavorable to the present applicant's contention. The concluding portion of the decision is as follows:

The point of trouble in this case, however, is that it is insisted that the filing was not in time, notwithstanding the fact that the court, by solemn order, when attention was called to the alleged illegal filing, sanctioned it, and assumed jurisdiction, and the effect of holding the order void would be to make a departmental ruling in relation to a proper construction of the statutes of New Mexico, so as to deny to the courts of that State jurisdiction in a matter which they had directly assumed on consideration of the express jurisdictional question.

Whether rightfully or wrongfully, there is a case pending in the district court in New Mexico, to determine the question of right of possession. If there is no jurisdiction the point can be clearly made and decided by the court; . . . but where the very question at issue is involved in a pending case and the court has assumed jurisdiction, and an opportunity is afforded the parties to have a judicial decision not only of the question of jurisdiction but of the merits of the case as well, it seems to me that it is now premature for the Department to declare that the court entertaining the case had no jurisdiction.

See also the case of *De Garcia et al. v. Eaton et al.* (22 L. D., 16).

The decision first cited is referred to approvingly in the case of *Madison Placer Claim* (35 L. D., 551), wherein it was held that failure to institute suit within the statutory period constitutes a waiver of the adverse claim.

In *Lindley on Mines*, 2nd Edition, Sec. 759, the following language is used:

The department claims the right to determine for itself the question of fact in each case as to whether the action has been commenced within statutory period; but when an action has been commenced, and the controversy arises in the court where the action is pending as to whether it was commenced in time or not, the determination of this fact will be left to the court, and the department will decline to proceed until the matter is there disposed of.

The objection that the suit was not commenced in time must be brought to the attention of the trial court by answer on some appropriate plea, if allowed under the practice, in the nature of a plea in abatement.

* * * * *

The action once commenced, the stay of proceedings in the land office, which became effectual upon the filing of the adverse claim, is prolonged and continued in force until the controversy shall have been settled or decided by the court. Until the decision of that tribunal is obtained, the function of the land department remains suspended.

* * * * *

All acts of the department performed, or attempted to be performed, while a suit is pending are null and void.

Snyder, in his work on mines, Sec. 713, states:

The action is deemed to be commenced when the requirements of the law, of the state or federal district where suit is brought, as to what constitutes the commencement of an action have been complied with. If it is brought in the state court, the question as to whether it has been duly commenced within the required time is one exclusively within the jurisdiction of such state court, and cannot be reviewed by the land department or federal court.

The Supreme Court of the United States, in the case of *Richmond Mining Company v. Rose* (114 U. S., 576, 582), answering a contention very similar to the one here urged, used the following language:

It is argued that, by reason of the failure to pay these fees within the time required by the statute of Nevada, the court acquired no jurisdiction of the case until after the thirty days within which, by the foregoing section, the action was to be commenced; and, also, that, because no process to appear was issued or served on the defendants within thirty days, the whole proceeding is void.

There are several sufficient answers to these suggestions.

1. We do not doubt that within the meaning of the act of Congress the plaintiffs did *commence proceedings* by filing their complaint on the 21st of October, eight days inside the thirty days which it allowed.

2. Defendants having demurred within a few days after this commencement of the suit, and answered, and gone to trial without raising this objection in the proper time, cannot be permitted to do it now.

3. What constitutes the commencement of an action in a State court being matter of State law, the decision of that court on this point is not a federal question, and is not therefore reviewable here.

These propositions also answer the objection of nonpayment of fees to the State, which is purely a matter of State concern, and if it could in any manner avail the defendant it must have been by motion at the time, and before demurring or answering to the merits.

The Nevada statutes quoted above were operative at the time the *Richmond-Rose* case arose.

Under the circumstances of this case, even conceding that the question here presented is an open one, in view of the foregoing authorities, it clearly does not lie within the province of the land department to say at this time that the institution of the pending suit was not a proceeding commenced in time within the purview of the federal statute. Certainly the Department will not undertake to review the validity of the order of the court here sought to be called in question.

The contention that the adverse claim, as such, is insufficient in form and substance does not favorably impress the Department. The instrument presented to the local officers was received and filed by them and treated as a sufficient adverse claim. They permitted entry to be made because of the supposed failure of the adverse claimant to commence proceedings in court in due time, not because the adverse claim as such was insufficient. In the view of the Department, the adverse claim has not been waived; it has not been dismissed and is, therefore, still pending and its effect to stay proceedings before the land department is still operative. Any question as to its sufficiency, in order to be properly tested, should be presented only after notice to the adverse claimant with an opportunity for him to be heard in the premises. So far as appears in the present record, the adverse claimant has received no notice of the allowance of the entry or of the attack upon the adverse claim or its effectiveness as a stay

of proceedings in the land department. But even if this question were properly presented for determination, the contention urged would hardly induce favorable action. The instrument filed, while not fully complying with all the regulations, is believed to sufficiently "show the nature, boundaries and extent of such adverse claim" within the purview of the statute. See in this connection the cases of *Kinney v. Von Bokern et al.* (29 L. D., 460) and *McFadden et al. v. Mountain View Mining and Milling Company* (On Review) (27 L. D., 358).

The further contention that the character of the land, whether lode or placer, is the only issue raised by the adverse claim is untenable. It follows that the entry was improperly and irregularly allowed and must be so treated and held in abeyance and suspended to await the outcome of the adverse suit and then to be disposed of in an appropriate manner.

The decision of your office is accordingly affirmed.

CAREY ACT—STATE SEGREGATION LISTS—INSPECTION OF LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 9, 1909.

INSPECTORS AND SPECIAL AGENTS,

Department of the Interior.

GENTLEMEN: In order to avoid unnecessary expense, delay, and annoyance to the Government, the states, and to persons contracting with the states to construct reclamation works in such projects, it is very important that a thorough and comprehensive examination of the lands be made prior to segregation thereof, to the end that no lands shall be segregated which are not desert in character and susceptible of reclamation because of their physical character and the available water supply. Lands non-desert in character, lands valuable for their timber, or lands containing deposits of coal or other minerals, should be reported for elimination from the selection lists as they are excluded by the terms of the act from the character of lands to be reclaimed; hence it is important that no such lands be included in any segregation. In brief, the time to ascertain whether the lands are of the character subject to segregation under the Carey Act, and whether there is water available for their reclamation, is prior to segregation.

Therefore, in your inspection of lands listed, you will carefully examine each tract and report to the Department:

First, whether there is a growth of native grasses thereon sufficient to make an ordinary crop of hay in usual seasons if not grazed.

Second, whether they will produce a remunerative agricultural crop of any kind without irrigation.

Third, whether they have thereupon a natural growth of trees; if so, giving by legal subdivisions the amount of timber upon each tract, the variety, approximate size and whether merchantable or not.

In connection with your examination as to the desert or non-desert character of the lands, you will ascertain whether the lands border upon streams, lakes, or other natural bodies of water, whether the adjoining or nearby lands produce agricultural crops or native grasses sufficient in quantity to be remunerative without irrigation, and any and all other material facts relating to the selected lands or lands in the vicinity, tending to determine their true character and classification.

Fourth, the lands must be closely examined to determine whether there are any indications of coal and other minerals thereupon, the report giving as nearly as possible their geological formation, specifying all mines located, opened, or being worked either upon the selected lands or upon lands in the immediate locality. The report should include not only the observations of the inspector or agent but any other information he is able to gather from miners or other residents of the locality.

Fifth, the report must also give an estimate of the population, if any, upon the lands withdrawn, describing specifically the settlements or other claims, and contain a statement describing the towns and other public improvements in the vicinity.

Sixth, if any irrigation systems have been constructed or begun upon the project, they must be described in detail, including a statement as to the kind of works used to store, hold, or take the water, dimensions, material of which constructed, when constructed, acre feet of storage capacity, present condition, and probable period of durability. This statement should also include a description of canals, ditches and laterals, head-gates, intakes, turnouts, flumes, tunnels, or other works, when built, condition, and probable period of durability, the position of the improvements being indicated upon a diagram when feasible.

Seventh, careful inquiry should be made with reference to the amount of water claimed to be available for the project, the source of the appropriation title, and date of such appropriation, the approximate amount of water actually available under valid appropriation for use on the project, taking into consideration the amount of water

in the stream or streams and the rights of prior appropriators. This may be given in total acre feet per season and the amount of cubic feet per second available for the entire project.

Eighth, the report must also describe the locations of the reservoirs, canals, and ditches proposed to be constructed for reclaiming the lands, and state whether the plan of irrigation through and by them is feasible.

Ninth, if possible an estimate as to the total construction cost of the plant and ditches by which the lands are to be reclaimed must be given, the names of the persons, firms, or corporations who may have entered into contracts with the state to reclaim and irrigate the lands, their financial standing and probable ability to carry out the terms of their contracts.

Officers need not confine their report entirely to the directions herein made, but in addition thereto should include a statement as to any and all facts which they deem to be material regarding the character of the lands, possibility of their reclamation and probability of the successful completion of the project within the time prescribed by the law.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

CHIPPEWA INDIAN LANDS—"CUT OVER" LANDS WITHDRAWN.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 13, 1909.

REGISTER AND RECEIVER,
Cass Lake, Minnesota.

SIRS: In accordance with the recommendation of the Commissioner of Indian Affairs, and pursuant to departmental instructions of March 10, 1909, all lands in the Winnibigoshish, Cass Lake, Chippewa of the Mississippi and Leech Lake Indian Reservations, not included in the National Forest created by the act of May 23, 1908 (35 Stat., 268), and not yet opened to homestead entry, are hereby withdrawn from homestead settlement and shall so continue for six months from date hereof.

The purpose hereof is to withdraw from settlement for a limited time the lands known as "cut over" lands in said reservations, set-

tlement on which as soon and as fast as the timber is removed is authorized by section 4 of the act cited, in order to permit Indians, or their heirs, who relinquish allotments within the limits of such National Forest, as provided in section 3 of the act cited, and also Indians whose allotments in said National Forest are included in State swamp selections, to select in lieu thereof lands outside of such National Forest.

Nothing herein shall be held to affect injuriously the rights of persons who prior to this date have actually settled in good faith on lands from which the timber has been completely removed.

Very respectfully,

S. V. PROUDFIT, *Acting Commissioner.*

Approved:

R. A. BALLINGER, *Secretary.*

TIMBER-FREE USE-PUBLIC MINERAL LANDS.

REGULATIONS.

The act of June 3, 1878 (Chap. 150; 20 Stat., 88), provides:

That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

In pursuance of the authority granted in the above section of the act of June 3, 1878, the following rules and regulations are hereby prescribed for the protection of the timber and of the undergrowth upon such lands, and for other purposes incidental thereto. The attention of persons seeking the free use of timber is particularly called to the fact that this act does not authorize the cutting of timber from any lands subject to any form of non-mineral entry. The act applies only to lands subject to mineral entry. Lands subject to mineral entry are such lands as are known to contain such deposits of mineral as warrant a prudent person in expending his time or money in the reasonable expectation of developing a mine thereon.

The proper protection of the timber and undergrowth upon lands to be cut over necessarily varies with the nature of topography, soil and forests.

First. Qualified persons within the states and territories named desiring to take timber for purposes authorized by law must make application for permit to cut timber, such application to be presented or mailed to any Register or Receiver, or to the Chief of Field Division having jurisdiction over the land.

Second. Such application shall set forth the names and legal residence of persons applying to fell and remove, and the names and residence of persons who are to use, the timber; also the amount of timber required by each person, and the use to be made thereof, and the date it is desired to begin cutting; also, the lands to be cut over shall be so described in the application that they may be identified from the descriptions set forth. The application must be verified by an applicant. Blank forms for making applications may be procured by addressing the Chief of Field Division.

Third. Immediately upon receipt of an application, the Chief of Field Division shall cause investigation to be made of the lands, and of material statements in the application. If the Chief of Field Division finds the timber may be cut for the purposes permitted by law, he may authorize cutting to proceed at once under such named restrictions (within the scope of these regulations) as the protection of the timber and undergrowth, may require. Such permit, or a refusal to grant permit, shall be subject to revision by the Commissioner of the General Land Office.

Fourth. Upon completing investigation of any application, the Chief of Field Division shall make report to the Commissioner of the General Land Office. His report shall contain the application, copy of his permit, or letter declining to grant permit, and shall further show (1) whether the lands are mineral, (2) whether persons named in application are (a) qualified to fell and remove and (b) authorized to use the timber as stated, (3) what percentage of the matured timber may be taken consistent with proper protection of the remaining timber and undergrowth, with the facts upon which he bases his conclusions; and what method of handling the tops, lops and debris made by logging is necessary for the protection of timber and undergrowth, and the facts upon which his conclusions are based.

Fifth. Permits granted shall specify (1) the persons authorized to fell and remove, and those authorized to use, with amount and use stated as to each person; (2) identify the lands to be cut over; (3) that only matured timber may be taken, and the percentage of the total stand, acre by acre, to be cut; (4) the method of disposing of

the tops and other debris; and (5) that the cutting authorized shall be completed within twelve months of date of permit, or application for renewal must be made.

Sixth. No timber may be cut in advance of a determined lawful use.

Seventh. No timber not matured may be cut. Each matured tree taken shall be worked up and utilized for some beneficial domestic purpose. Persons taking timber for specific purposes only will be required to take only such matured trees as will work up to such purpose without unreasonable waste.

Eighth. Brush, tops, lops and other forest debris made in felling and removing timber shall be disposed of in the manner best adapted to protecting the remaining growth, and as stated in the permit granted.

Ninth. No timber cut or removed under the provisions of this act may be transported from or used out of the state or territory where cut.

Tenth. Persons who commence cutting upon permit of Chief of Field Division before final approval by the Commissioner will be liable to the Government for a reasonable stumpage for timber so taken in event the permit is not finally approved by the Commissioner because improperly granted. Where permits are secured by fraud, or immature trees are taken, or timber is not taken or used by persons in accordance with the terms of the law, the Government will enforce the same civil and criminal liabilities as in other cases of timber trespass upon public lands.

Eleventh. Registers or Receivers receiving applications under this act will at once forward same to the proper Chief of Field Division, and notify the applicant thereof.

Twelfth. Registers and Receivers are required to ascertain from time to time whether any timber is being cut from mineral lands, except as provided by this act, and notify the Commissioner of the General Land Office, or a special agent of such office, who will make any investigation required. Special agents will also keep informed of all timber cutting within their territory.

Thirteenth. These rules and regulations shall be in force from and after May 1, 1909, and supersede all prior regulations hereunder.

FRED DENNETT, *Commissioner.*

Approved March 16, 1909:

R. A. BALLINGER, *Secretary.*

BERTIE E. HARDESTY.

Motion for review of departmental decision of March 17, 1909, 37 L. D., 343, denied by First Assistant Secretary Pierce, March 17, 1909.

ACCOUNTS—DEPOSIT OF PUBLIC MONEYS BY RECEIVERS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1909.

RECEIVERS OF PUBLIC MONEYS,

United States Land Offices.

SIRS: It is observed that some receivers of public moneys of United States land offices are not complying with instructions contained in circular No. 47 of the Treasury Department, dated April 5, 1905, requiring:

Collectors and surveyors of customs, collectors of internal revenue, and receivers of public moneys, living in the same city or town with the Treasurer, or an assistant treasurer of the United States, or a national bank depository, must deposit their receipts at the close of each day. Officers at such a distance from a depository that daily deposits are impracticable, must forward their receipts as often as they amount to one thousand dollars, and at the end of each month without regard to the amount then accumulated.

In connection with said circular, and its requirements, your attention is called to Sec. 91 of act of March 4, 1909 (Public—No. 350), "An act to codify, revise, and amend the penal laws of the United States," which is a reenactment of Sec. 5492, United States Revised Statutes, to wit:

Whoever, having money of the United States in his possession or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depository of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years.

Inspectors of land offices are instructed to report all cases that come to their knowledge of the failure of any receiver to make deposit as required by said circular.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

NORTHERN PACIFIC RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* McCORMICK.

Patented lands which on January 1, 1898, were involved in a pending controversy in the courts, between the Northern Pacific Railway Company and the patentee, come within the purview of the act of July 1, 1898, and the parties are entitled to the right of adjustment provided by that act.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 17, 1909.* (G. B. G.)

This is an application first presented to, and informally denied by, your office, on behalf of the Northern Pacific Railway Company for adjustment under the act of July 1, 1898 (30 Stat., 597, 620), in the case of Northern Pacific Railway Company *v.* John McCormick, involving the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 21, T. 13 N., R. 18 W., Missoula land district, Montana.

By departmental decision of January 18, 1907 (unreported), your office decision of July 2, 1906, denying an adjustment of the conflicting claims of the parties, under said act, to the above described tract, was formally affirmed upon the ground that a controversy before the land department between McCormick and the company had been finally determined and the land patented to McCormick in accordance with such adjudication prior to January 1, 1898, and that there was therefore on the last-mentioned date no such pending controversy involving said land as was subject to adjustment under the provisions of said act.

In support of the present application it is stated:

This case was handled by the company along with a great many others, and attention was not specifically called to the following material facts:

January 6, 1891, the company brought an action of ejectment against McCormick in the United States Circuit Court for the district of Montana. To the answer of the defendant the company demurred, and the demurrer was overruled April 3, 1893 (55 Fed. Rep., 601). From this decision the company appealed and the appeal was decided by the Circuit Court of Appeals February 10, 1896 (72 Fed. Rep., 736). August 16, 1898, judgment was rendered in favor of McCormick, and this decision was sustained by the Circuit Court of Appeals May 22, 1899 (94 Fed. Rep., 932).

In view of these facts it is manifest that on January 1, and July 1, 1898, there was a pending controversy between McCormick and the company which would, under accepted rulings, bring the case within the provisions of the act of July 1, 1898.

It is believed that if this statement is correct the application must be allowed. The principle was considered in the case of Humbird *v.* Avery (195 U. S., 480), and at page 506 thereof is found the following significant language:

What has been said is peculiarly applicable to the unpatented lands in dispute. It is equally applicable to lands patented both before and after the passage of the act, if such lands are *in dispute* and *belong to either of the*

classes described in the act of 1898. We agree with the Circuit Court that the act "gives the option to keep or relinquish the disputed land to the individual claimant in every instance. If he elects to retain that land, it is to be listed by the Secretary in lists to be furnished to the railroad claimant, who must relinquish, and whose consent to this was given by the acceptance of the act." In case of such relinquishment by the railroad company, it acquires a right to select other lands in place of those retained by the individual claimant. If the individual claimant, having a patent, elects to surrender his right, then he must reconvey to the United States, and will then be entitled to select other lands in lieu of those surrendered. So that the statute embraces both patented and unpatented lands, in respect of which the railroad company or its successor in interest claims that a right thereto attached by the definite location of its road or by selection, provided they are also such lands as were originally "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department.

This was said, as appears from the text, with reference to a right of adjustment under said act in the individual claimant, but it may not be successfully disputed that if under the circumstances therein recited, a right of adjustment must be accorded the individual claimant, it is necessarily true that there is a correlative right of adjustment in the railway company. For instance, under the facts of this case, assuming that the final decision of the Circuit Court of Appeals referred to had been in favor of the railway company, it is not thought that the right of the individual claimant to an adjustment would have been questioned, and if there was a right of adjustment in such claimant there was also by the very terms of said act, necessarily a right of adjustment in the railway company.

Said departmental decision of January 18, 1907, is therefore hereby vacated and your office is directed, upon a proper showing of the facts stated in this application, to list the tract involved for adjustment under said act.

Reverting to the decision of the court in *Humbird v. Avery, supra*, it is clear therefrom that the individual claimant will be entitled to the right of election accorded by said act, and if he elects to reconvey the land involved to the United States he will be entitled to select other lands in lieu thereof, in the usual manner.

CONTRACT FOR SURVEY OF LANDS—DEPUTY MINERAL SURVEYOR.

PHILIP CONTZEN ET AL.

No obligation on the part of the government to enter into a contract for the survey of public lands arises from a mere authorization to the surveyor-general to enter into such contract in accordance with bids made upon advertised proposals: it is only when a contract is entered into by the Commissioner of the General Land Office that any obligation on the part of the United States is assumed.

A deputy mineral surveyor is disqualified to make entry under the public land laws.

The making of an entry of public lands by a deputy mineral surveyor, while sufficient cause for the revocation of his appointment as such surveyor, will not of itself disqualify him from entering into a contract for the survey of public lands; and the department will not control the exercise of the discretion of the Commissioner of the General Land Office either in refusing or accepting the offer of such surveyor to contract for the survey of such lands.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, March 17, 1909. (F. W. C.) (E. F. B.)

Philip Contzen and Willard F. Steele have appealed from the decision of your office of February 4, 1909, rescinding the award to appellants of a contract for the survey of townships 17 and 18 N., ranges 18 and 19 W., and T. 20 N., R. 19 W., G. and S. R. B. and M., Arizona, payable from special deposits made by the San Francisco Railroad Company.

Proposals for the execution of these surveys were invited by advertisements published in the usual manner, notifying bidders that "the right is reserved by this office to reject any and all bids and no contract will be binding on the part of the United States until approved by the Commissioner of the General Land Office."

Appellants submitted a bid for the survey of said townships, which was approved by the surveyor-general, who recommended that said contract be granted.

By letter of November 19, 1908, you concurred in the recommendation of the surveyor-general and requested authority to enter into a contract with Contzen and Steele for the survey of said townships, which was approved by the Department, November 20, 1908.

November 25, 1908, you authorized the surveyor-general to award a joint contract to Contzen and Steele for the execution of said surveys, but before they were notified of your action the surveyor-general was instructed by telegram to suspend action upon the same, and, by letter of February 4, 1909, he was advised that the contract was rescinded for the reason that Philip Contzen had made homestead entry of a tract of land in Arizona at the time he held the position of deputy mineral surveyor, and that said entry was made in violation of law because of his disqualification. By letter of February 1, 1909, the surveyor-general was instructed to notify Contzen that he will be allowed sixty days from service of notice within which to show cause why his appointment as deputy mineral surveyor should not be revoked.

It is urged by appellants, first, that your action was premature in rescinding the contract before the expiration of the time allowed Contzen to show cause why his appointment as deputy mineral surveyor should not be revoked; second, in deciding that the making of

a homestead entry by Contzen while holding the position of deputy mineral surveyor is sufficient cause why a contract for the survey of public lands should not be awarded him; third, that having accepted the joint bid of Contzen and Steele, your office is without authority to rescind the award except for failure or breach upon the part of the deputies or upon a showing that they are incompetent and that the Government might be placed in danger of loss by accepting said bid.

Considering those propositions in the inverse order, the Department holds: First, that there is no obligation on the part of the Government to enter into a contract for the survey of the public lands although bids have been made upon advertised proposals, and the surveyor-general has been authorized to execute the contract. It is only when the contract is entered into by the Commissioner of the General Land Office that any obligation or liability on the part of the United States is assumed. That was expressly announced in the proposal, and the submission of bids was made with that understanding.

Furthermore, before appellants were notified of the approval of the recommendation of the surveyor-general that a contract be entered into with Contzen and Steele in conformity with their bid, the acceptance of the bid by the United States was withdrawn.

Second, that a deputy mineral surveyor is disqualified from making entry under the public land laws. *Floyd v. Montgomery* (26 L. D., 122); *Lavagnino v. Uhlig* (26 Utah, 1). While the making of an entry of public lands by a deputy mineral surveyor will be sufficient cause for the revocation of his appointment as deputy mineral surveyor, it will not of itself disqualify such person from entering into a contract for the survey of public lands, but the Department will not control the exercise of your discretion either in refusing or accepting the offer of such person to contract for the survey of the public lands.

Third, that, although your action rescinding the instruction to the surveyor-general to enter into a contract with Contzen and Steele, taken within three days from the date of the rule allowing Contzen sixty days in which to show cause why his appointment of deputy mineral surveyor should not be revoked, was premature, it is not a sufficient ground for further suspension of this matter, in view of the ruling herein made.

Your decision is affirmed.

SCHOOL LAND—INDEMNITY—TEMPORARY RESERVATION.

STATE OF CALIFORNIA.

The approval of a school indemnity selection, constituting a disposition of public lands, is a matter within the exclusive jurisdiction of the land department, and until that jurisdiction has been lost by the issue of patent or other action equivalent thereto, the courts, either State or Federal, may not interfere to control the exercise of such jurisdiction.

While the mere inclusion of sections 16 and 36, granted for school purposes, within a withdrawal made for the purpose of investigation and examination of the lands with a view to possible inclusion in a national forest, is not such a reservation thereof as will afford a base for indemnity, yet where such withdrawal continued for a number of years, and the school sections have since been included in a permanent reservation, a selection based upon such sections, although filed during the period of temporary withdrawal, may be adjudicated in the light of the present status of the base lands.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, March 18, 1909.* (S. W. W.)

The State of California has appealed from your office decision of August 31, 1908, rejecting its indemnity school land selection, filed January 18, 1908, serial No. 0317, for all of section 5, T. 26 N., R. 17 E., Susanville land district, in lieu of section 16, T. 42 N., R. 3 E., M. D. M., unsurveyed, alleged to have been lost to the State by virtue of a temporary withdrawal for forestry purposes, dated December 19, 1904.

It seems that an application was made to the State surveyor-general for the selection of said section 5 upon the base above described, and that that officer refused to make the selection on behalf of the State, for the reason that the land department of the Government did not regard school sections in mere temporary withdrawals as valid base for indemnity selections. Thereupon, an application was made to the District Court of Appeals of the State of California in and for the First Appellate District, for a writ of mandamus to compel the State surveyor-general to make the selection, and, upon hearing, the court granted the writ of mandamus, and compelled the State surveyor-general and ex-officio register of the State land office to make application for the said selected land upon the base assigned.

A certified copy of the opinion of the court in that case was filed in support of the State's appeal, from which it appears that a hearing was denied by the Supreme Court of the State on September 5, 1907.

It appears from your said office decision of August 21, 1908, that the land assigned as base herein was temporarily withdrawn for forestry purposes on December 13, 1904, as above stated, and that such temporary withdrawal was still in force and effect, and had not been made permanent at the date of your said decision.

Your office, in denying the State's application, was controlled by the Department's decision of December 10, 1903 (32 L. D., 346), to the effect that the mere inclusion of sections 16 and 36, granted for school purposes, within a withdrawal made for the purpose of permitting investigations and examinations of lands with a view to their possible inclusion within a forest reserve, does not place them within a "reservation," within the meaning of that term as employed in the act of February 28, 1891 (26 Stat., 796), and that therefore

school selections so included in a temporary withdrawal do not afford a base for the selection of indemnity lands.

While it is true that the State surveyor-general as an officer of the State was compelled under the order of the court to make the selection, it is obviously untenable that the United States is in any way controlled by the action of the court. The approval of a school indemnity selection is a disposition of public lands, a matter within the exclusive jurisdiction of the land department of the United States, and until that jurisdiction has been lost by the issue of patent or other action equivalent thereto, the courts, either State or Federal, may not interfere to control the exercise of such jurisdiction. See *Riverside Oil Company v. Hitchcock* (190 U. S., 316); *Johnson v. Towsley* (13 Wall., 72); *Humbird v. Avery* (195 U. S., 480), and numerous cases cited.

However, while the land department of the Government is in no sense controlled by the action of the court in this case, it does not follow that the reasoning of the court may not be considered or may not be adopted if found satisfactory.

Upon informal inquiry at your office it has been ascertained that on March 2 of the present year the land assigned as base for the selection involved herein was included in the enlarged Shasta National Forest. It will thus be seen that the base land was temporarily withdrawn December 13, 1904, and for more than four years thereafter remained in that condition. To hold that for a period of more than four years, during which time the desirable public lands in the State were being rapidly disposed of, the State must remain passive and await the final action of the land department of the Government respecting lands which are temporarily withdrawn, is to impose upon the State conditions which it is believed are wholly inequitable, and not at all compatible with the meaning of section 2275, as amended.

It is undoubted that while a temporary withdrawal exists lands embraced therein are not subject to disposal under any of the public land laws, and if, while so withdrawn, the lands are surveyed and thereafter placed in a permanent reservation, it is not believed that the State would acquire any right to school sections involved until the reservation embracing them should be finally extinguished.

In view of the facts, the long period during which the base lands were embraced within the temporary withdrawal, and their subsequent inclusion in the permanent reservation, the Department is disposed to remand the case for adjudication in accordance with the present status of the base lands; and in such adjudication, your office will be in no way controlled by the decision of December 10, 1903, *supra*.

The views expressed herein will also control your office in the adjudication of such other similar cases as may be pending.

NORTHERN PACIFIC SELECTION — SETTLEMENT — SECTION 3. ACT
MARCH 2, 1899.FRANK ET AL. *v.* NORTHERN PACIFIC RY. CO. (ON REVIEW).

Departmental decision of October 16, 1908, in this case, based upon the decision of the Supreme Court of the United States in *St. Paul, Minneapolis and Manitoba Ry. Co. v. Donohue* (210 U. S., 21), to the effect that land embraced within a *bona fide* settlement claim is not subject to selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, and that a selection allowed for land at the time covered by such claim can not stand, notwithstanding the settlement claim may have been subsequently abandoned, adhered to on review.

An affidavit of contest against a selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, based upon prior settlement, should allege that the settler was at the date of such settlement qualified to enter the land under the homestead law.

First Assistant Secretary Pierce to the Commissioner of the General
(G. W. W.) *Land Office, March 18, 1909.* (G. B. G.)

There has been filed before this Department a brief on behalf of the Northern Pacific Railway Company in the nature of a motion for review, or a recall and modification, of departmental decision of October 16, 1908 (37 L. D., 193), in the case of Lorin Frank *et al.* against said company, involving the sufficiency of certain affidavits filed in support of applications to contest the claim of said company to certain described tracts of land situated in township 7 south, range 8 west, Portland land district, Oregon.

For the purposes of this motion it should be again recited that the west half of said township, wherein said tracts are located, has been surveyed but that the survey has not been accepted and that said tracts were selected by the Northern Pacific Railway Company June 6, 1900, per list No. 13, under the provisions of the act of March 2, 1899 (30 Stat., 993, 994), section three of which authorizes the company to select nonmineral public lands, so classified as nonmineral at the time of actual government survey, "not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection."

The case arose upon the applications of the said Lorin Frank, and nine other persons, to contest the company's said selection, in support of which they filed their respective affidavits, which have since been corroborated, in substance and effect that they and each of them on or about March 1, 1900, made homestead settlement upon certain of these lands, described in the affidavit, that on June 6, 1900, which was the date of the company's selection, the affiant had certain improvements on said land, consisting of a dwelling house and a clearing; that he was at that date a *bona fide* settler thereon; and that the

said railway company did unlawfully and wrongfully file in the local land office its said list of lieu selections, including the tract claimed by the affiant, and that said company is now wrongfully and unlawfully seeking by means of said list to acquire title to said land.

These affidavits do not admit in terms that the affiants have not continued to reside upon and improve their respective claims but it is said that the long delay of the government in surveying and approving the survey in question and the inclusion of the same in the Tillamook Forest Reserve, March 2, 1907, has all tended to discourage the settlers on said land and has caused some of them to abandon their homestead claims but that these claims were not abandoned until after the railway company had filed its said list of lieu selections. It may be concluded, therefore, by strong inference, from what is said, that these particular claimants have not kept up their residence.

Considering these affidavits, the Department in its said decision of October 16, 1908, held, upon the authority of the case of *St. Paul, Minneapolis and Manitoba Ry. Co. v. Donohue* (210 U. S., 21), that:

If a *bona fide* settlement claim had attached to these lands and was subsisting at the date of the company's proffered selection thereof, the selections can not stand. It is immaterial that the settlement claim may have been subsequently abandoned—

and thereupon ordered a hearing upon said affidavits, after due corroboration thereof.

The company's present motion is based mainly on two grounds: (1) It is argued with much persistence and at great length that the Department has wholly misunderstood and misinterpreted the decision of the Supreme Court of the United States in the *Donohue* case, *supra*. (2) It is contended that even if the rule of law announced in this case is sound, these affidavits are not in form and substance sufficient because they do not state that the affiant, whose settlement claim is tentatively considered, has the qualifications of a homestead entryman, and it is argued upon this question that it would be wholly inequitable to put the company to the expense of a hearing in the absence of specific allegation that these settlers are and were at the date of their settlement claims qualified to make entry under the homestead law. As a corollary of this proposition it is, of course, insisted that the settlement claim of a person who is not qualified to make a homestead entry is not such claim as would defeat the right of the company to make lieu selection under said act.

Upon the first question the Department is constrained to adhere to its former ruling. Notwithstanding the strenuous argument of counsel, no difference is perceived in this case and that of the said case of the *St. Paul, Minneapolis and Manitoba Railway Co. v. Donohue*. In

that case one Jerry Hickey, having the legal qualifications of a homestead entryman, in March, 1893, settled upon unsurveyed public land of the United States in Duluth land district, Minnesota. The land was within the territory in which that company had a right of indemnity selection of unsurveyed lands under the act of August 5, 1892 (27 Stat., 390), to which no right or claim had attached or been initiated in favor of another. Two years and eight months after the settlement by Hickey the railway company made indemnity selection of the land embraced in his claim and upon which he had built his residence. Seven months later the official plat of survey of the township in which the lands were situated was filed in the local land office and on that day Hickey made application to enter the tract under the homestead laws, and on that same day the railway company presented a supplementary list of selections conforming the same to the survey of the township. Because of this conflict a contest ensued, pending which Hickey died. His mother was substituted as his sole heir and the result of that proceeding was that ultimately the Secretary of the Interior decided in favor of the Hickey claim. Subsequently the mother of Hickey filed in the local land office a relinquishment of her claim to the entire tract and simultaneously with such relinquishment Donohue filed an application to enter the land under the timber and stone act and his claim was allowed. The railway company contested this timber and stone entry and the contest thus created was finally decided by the Secretary of the Interior in favor of the railway company and a patent issued to it for the lots in dispute. Upon this state of facts, and in a proceeding instituted by Donohue in the courts of Minnesota to hold the company liable as his trustee, the Supreme Court said:

It is clear that the ruling rejecting the Donohue claim and maintaining the selection of the railway company was erroneous as a matter of law, since by the terms of the act of August 5, 1892, c. 382, 27 Stat., 390, the railway company was confined in its selection of indemnity lands to lands nonmineral and not reserved "and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection." . . . When the selection and supplementary selection of the railway company was made the land was segregated from the public domain and was not subject to entry by the railway company. *Hastings & Dakota Ry. Co. v. Whitney* (132 U. S., 257), *Whitney v. Taylor* (159 U. S., 85); *California and Oregon Ry. Co. v. United States* (190 U. S., 186).

It is thus seen that in a case involving an indemnity selection under an act *ipsissimis verbis* of the one here under consideration, it was held that a settlement claim subsisting at the date of the indemnity selection operated to "segregate" the land "from the public domain," and that although this claim was afterwards abandoned by the heir of the settler claimant who had under the law and a decision of the

land department been substituted to the rights of such claimant, yet the company took nothing by its selection, and that Donohue, though a stranger to the proceeding before the land department and, so far as appears from the record, not in fact (as in law he could not be) in privity with such claimant or his heir, took title from the United States free from any claim of the company.

But it is argued that the settlement claim in the case cited has an important distinguishable difference from those involved in this case, in that in the case cited the claim went to entry under adjudication by the land department, and that the question of abandonment there involved was one occurring after such adjudication and entry, whereas in the present case there has been no adjudication and no entry, and that if there has been in fact an abandonment of these settlement claims the difference is important and controlling.

The argument is more specious than convincing. The railway company is only entitled and will only be accorded a judgment upon the merits of its selection when proffered. This is in accord with the rulings of the land department and is the plain theory of the Donohue case, *supra*, which only deals with the company's claim as of the date of the selection. The Department therefore, in respect to this, is constrained to deny the company's contention.

Upon the second question the Department sees force in the contention made. Without going into the legal question more or less involved therein, it is certainly true that if these alleged settlers were not possessed of the necessary qualifications to make entry of the lands settled upon by them under the homestead law, it goes far toward saying that these settlements were not made in good faith. This thought would have special force in this case because of the allegation, presumably well founded, that these lands are very valuable for the timber which they contain and it may be true that it was the purpose of these settlers to acquire valuable tracts of timber rather than to take these lands under the homestead law, and the Department is quite clear that unless these settlements were made in good faith they did not operate to reserve said lands from appropriation by the railway company under said act.

Upon more mature consideration it is therefore held that these affidavits are defective in that they fail to state that the affiants were at the date of their respective settlements duly qualified to enter lands under the homestead law, and they must be amended before the case goes to hearing.

That there may be no misapprehension as to the future contingent rights of the parties, it is thought expedient at this time to call attention to the order of March 2, 1907, establishing the Tillamook Forest Reserve. While it necessarily follows from what has been said

that if it be satisfactorily established at the hearing hereinafter ordered, that these settlement claims were *bona fide* and subsisting on June 6, 1900, the railway company's selection must fail, it does not necessarily follow that these claimants will be permitted to enter the land. The proclamation establishing said forest reserve excepts from its force and effect "all lands . . . upon which any valid settlement has been made pursuant to law," but this is subject to the proviso that the "settler continues to comply with the law under which the . . . settlement was made." If it is shown, as is now surmised, that these settlers have not continued to comply with the settlement laws, while the settlements may defeat the company's selection, yet they would not now be permitted to complete title to the land. In such contingency the proclamation operated upon it and it is now a part of the reserve as surely as though such settlement claims had not been initiated. On the other hand, if it be shown that these claims were not initiated in good faith, or were not subsisting as such June 6, 1900, the company's selection was the initiation of such claim as is protected by a further provision in said proclamation excepting all lands covered by any "lawful selection duly of record in the proper United States land office" March 7, 1907.

It is hereby directed, upon the filing of amendatory affidavits, as hereinbefore indicated, that a hearing be ordered, after due notice to all parties in interest. The decision under review is so modified.

SECOND HOMESTEAD ENTRY—SALE OF IMPROVEMENTS ACCOMPANIED
BY RELINQUISHMENT.

ARTHUR H. MILLER.

A homestead entryman who disposed of the improvements upon his entry for a consideration and accompanied the sale by a relinquishment of the entry is not entitled to the right of second entry under either the act of April 28, 1904, or the act of February 8, 1908.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 18, 1909.* (A. W. P.)

An appeal has been filed by Arthur H. Miller from your office decision of December 19, 1908, wherein you deny his application to make a second homestead entry under the act of February 8, 1908 (35 Stat., 6), for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 6, T. 26 N., R. 21 E., in lieu of his original homestead entry, No. 4565, made April 9, 1902, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 12, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, T. 25 N., R. 28 E., canceled upon relinquishment April 13, 1904, all of said land being in the Waterville, Washington, land district.

In support of this application, which was transmitted by the local officers' letter of August 29, 1907, Miller filed corroborated affidavit, wherein it was alleged in effect that in the spring of 1903 he broke seventy acres of the land embraced in his former entry, fenced a portion of the tract, and sowed the seventy acres broken to spring wheat, from which he harvested a light crop; that in September, 1902, he built a box house upon the land, established his residence therein, where he continued to reside until the fall of 1903, when he "sold the improvements for \$500, about a fair value of same," and went to California because of the serious illness of his infant son.

Upon examination of this showing, your office by letters of April 1 and July 3, 1908, directed the local officers to call upon the applicant for additional evidence as to the character and cost of the improvements alleged to have been sold by him for the sum of \$500. On receipt of this showing your office, by decision of December 19, 1908, after careful consideration of same, as well as the showing made by Miller in support of his said application, determined that as the alleged sale of said improvements was accompanied by a relinquishment of his homestead entry, he was not entitled to make a second homestead entry under the provisions of the act of February 8, 1908, *supra*. In reaching this conclusion your office referred to the unreported departmental decision of August 31, 1908, in the case of John W. Doctor, wherein it was determined that as the applicant had received the sum of \$14, the amount of the fees and commissions paid on his original homestead entry at the time he relinquished same, he was barred from making a second homestead entry under said act. Accordingly you rejected Miller's application.

Accompanying his appeal therefrom to the Department, Miller has filed a number of affidavits relative to the improvements he had placed upon the land embraced in his former entry, the value of same, as well as the fact of the serious illness of his child, which was alleged to be the cause of his disposing of such improvements and abandoning his homestead entry.

The Department has carefully examined same, the showing made in support of his said application, and also the records of your office. From the latter it is disclosed that on the date Miller's relinquishment of his original homestead entry was filed, to wit, on April 13, 1904, the land upon which the said improvements were located was at once embraced in the homestead entry of another. In no case, so far as disclosed, has the Department ever allowed a second homestead entry upon a showing of this character, where, as indicated, the alleged sale of the improvements placed thereon was accompanied by a relinquishment of the homestead entry. In fact, in the case of John W. Doctor, *supra*, referred to in your said decision, the appli-

cant received only the amount of his fee and commissions, paid at the time of relinquishing his original homestead entry; and in the unreported departmental decision of April 9, 1908, in the case of Michael E. Scott, it was determined that the receipt of twenty-five dollars as reimbursement of the fees expended at the time of making the original homestead entry was a bar to the making of a second homestead entry under either the act of April 28, 1904 (33 Stat., 527), or the said act of February 8, 1908. Accordingly in both instances applications to make second homestead entry were rejected.

Careful consideration of the case at bar discloses no good or sufficient reason for reaching a different determination. The decision of your office rejecting Miller's said application to make a second homestead entry is therefore affirmed.

COAL LAND—ALASKA—PAR. 27, REGULATIONS OF APRIL 12, 1907,
AMENDED.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 20, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices in Alaska.

GENTLEMEN: Paragraph 27 of the coal land regulations approved April 12, 1907 (35 L. D., 665, 680), governing applications and entries of coal lands in Alaska, is hereby amended to read as follows:

27. Any party duly qualified under the law, *after* swearing to his notice of location or application for patent, may, by a sufficient power of attorney duly executed, under the laws of the state or territory in which such party may be then residing, empower an agent to file with the register of the proper land office the notice of location or application for patent, and also authorize him to make payment for and entry of the lands in the name of such qualified party; and when such power of attorney shall have been filed in the local land office, such agent may act thereunder as indicated.

You will perceive that the paragraph as amended contains no limitation as to the number of applicants for whom a duly qualified agent may act.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

PRIVATE LAND CLAIM—SURVEY—JURISDICTION OF LAND DEPARTMENT.

HUGH STEPHENSON OR BRAZITO GRANT.

While the validity of title to a private land grant does not depend upon the issuance of a patent, where the boundaries of the tract have been clearly defined and can be identified, it is nevertheless the duty of the land department to fix by appropriate surveys the boundaries designated by the confirmatory act, especially where such survey is essential to the accurate segregation and delimitation of the private claim from the public lands.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 20, 1909.* (E. F. B.)

By letter of January 5, 1909, you submit the report of the examination made by a Special Inspector into the matter of the survey of the Hugh Stephenson or Brazito grant in New Mexico. That examination was made pursuant to the direction of the Department in its decision of October 10, 1907 (36 L. D., 117), with a view to ascertain whether the survey of said grant by Leonard M. Brown in 1903, and approved by your office October 5, 1905, followed and retraced the lines of a survey of said grant made in 1854 by Stephenson Archer, the grant having been confirmed according to the field notes and plat of that survey.

This investigation was ordered because of a material conflict of the Brown survey of the Brazito grant with the Santo Tomas de Yturbe Colony grant as patented October 17, 1905, in conformity with a survey of that grant approved by the Court of Private Land Claims June 26, 1903.

The east boundary of the Colony grant is coincident with the west boundary of the Brazito grant, but the Colony grant as patented is overlapped by the Brown survey, which was approved by your office.

The decision of October 10, 1907, which directed the investigation, was rendered upon the appeal of the Mesilla Valley Realty Company, owner of the Colony grant, from the action of your office approving the Brown survey, and requiring it to show cause why a patent should not be issued in conformity with that survey. The owner of the Colony grant contended that the land department had no authority to issue a patent, or to extend its surveys over lands that had previously been surveyed and patented subsequently by the United States pursuant to a decree of the Court of Private Land Claims. It further contended that the west boundary of the Brazito grant as surveyed by Brown does not follow the bed of the Rio Grande river as it ran in 1854, and indicated by the Archer survey, which is a boundary common to both grants, it being the east boundary of one and the west boundary of the other.

It was determined by the Department in that controversy that the issuance of a patent for the Colony grant in conformity with the decree of the court and the approved survey of that grant, did not remove from your office jurisdiction to have the boundaries of the Brazito grant as confirmed by Congress marked by an approved survey, although it may conflict with the patented Colony grant, for the reason that while the Court of Private Land Claims had sole jurisdiction, so far as concerns the interest of the United States, to determine the validity and extent of claims to lands within the jurisdiction conferred by the act (*Ainsa v. Railroad Company*, 175 U. S., 76, 89), it had no jurisdiction to pass upon the merits of any lawful claim the right to which had been acted upon and decided by Congress (*United States v. Baca*, 184 U. S., 653), and that the duty of the court "is discharged by determining the extent and validity of the grant as between the United States and the grantee, and it is not incumbent upon the Court of Private Land Claims to determine the priority of right as between him and another grantee." (*United States v. Conway*, 175 U. S., 60, 69.) As to all lands in conflict, the adverse claimants may in the proper forum litigate between themselves which of the two is entitled to the land.

It was therefore held that if the Brown survey followed the boundaries indicated by the survey of Archer, the Department would not hesitate to sustain your approval of that survey, as it is clearly your duty under the confirmatory statute to fix and mark by an approved survey the boundaries of the grant and to furnish to the confirmees official recognition by the Government of the extent of the grant as confirmed by the act of June 21, 1860 (12 Stat., 71).

The correctness of that survey was, however, questioned. It was alleged that it did not follow the bed of the Rio Grande river as it ran in 1854, and as it was surveyed by Archer. Its radical departure from the lines of the Archer survey had been called to the attention of the Court of Private Land Claims in a protest by the confirmees of the Colony grant against the approval of the original survey of that grant, under the court decree, which fixed its eastern boundary by closing upon the western boundary of the Brazito grant as surveyed by Brown in 1893. The court sustained the protest, and a re-survey was made by direction of the court, which established the east boundary of the Colony grant about two miles east of the west boundary of the Brazito grant as designated by the Brown survey. That is known as the Turley survey.

The report of the Special Inspector shows that a very careful examination was made of the lines of the several surveys of the boundary common to said grants and of the topographical features along said lines, with a view to determine whether the west boundary of the Brown survey retraced the lines of the Archer survey, which fol-

lowed the meander of the Rio Grande river as it ran in 1854. It is found by the Special Inspector upon very satisfactory proofs that the Brown survey does not follow the lines of the Archer survey, and does not follow the Rio Grande river as it ran in 1854.

He also finds:

First. That Leonard M. Brown's survey of the west boundary of the Bracito grant from the mouth of the old Bracito ditch to Station 96, is grossly incorrect.

Second. That the field notes and map of Stevenson Archer's survey are so inaccurate as to render them valueless as a guide to a correct survey of the Bracito grant.

Third. That the survey of the Santo Tomas grant, executed by Jay Turley, from the mouth of the old Bracito ditch to Station 100, followed the general course of the Rio Grande as that stream flowed in the year 1854, although it did not follow the left bank at most points from the beginning corner down to within about 40 links of Station 46, and at a few other points south of there departed somewhat from the top of that bank.

Fourth. That it is not possible at the present time to ascertain the exact location of the left bank of the old river from Station 100 down to the SE. cor. of Tract No. 1 of the Santo Tomas grant, although Turley's line between those points is probably a reasonable approximation to its location.

Fifth. That it is possible to make a survey that will accurately locate the left bank of the old river of 1854 from the mouth of the old Bracito ditch down to Turley's Station 100, which survey when accurately made would form the true western boundary of the Bracito grant.

The Special Inspector states that to make a perfectly accurate survey of the Brazito grant will require a more careful study of the topographical features of the ground than can be reasonably expected under a system where the compensation of the deputy surveyor depends upon the length of the line to be established; that Turley's survey of the Colony grant is as nearly accurate as the Government is likely to get under such contract; that is, of the line common to both grants.

Upon the filing of that report the attorneys for the Brazito claimants withdrew their application for patent, to which the owners of the Colony grant objected and insisted that the controversy should proceed to a final determination.

You concur in the findings of the Special Inspector and recommend that instructions be now issued to locate upon the ground the Archer survey as nearly as possible, being guided therein by the ascertainment of the ancient bed of the Rio Grande as it existed in 1854.

If the duty of the Department ended with the disapproval of the Brown survey, this matter might be dismissed without further consideration, but the confirmatory act of June 21, 1860, contemplated that this grant should be surveyed, not only for the purpose of furnishing the owner of the grant definite means of ascertaining the extent of his possessions under his confirmed title, but it is also

essential for the purpose of definitely segregating the grant from the public domain. (*Stoneroad v. Stoneroad*, 158 U. S., 240.) So that the duty of the Department to mark and fix the boundaries of this grant is as imperative now as it was when the survey was supposed to conflict with the patented Colony grant.

The Brazito claimants protest against the taking of any further action in this matter by the land department, and insist that the withdrawal of their application for patent had the effect of taking the matter out of its hands, leaving it without anything upon which it can take action. They contend that as the complete legal title vested in the Brazito claimants by virtue of the confirmatory act of June 21, 1860, the approval of the Brown survey by your office was final, and that the only function of a patent would be a further recognition by the United States of the title in said claimants.

It is true that the validity of a title to a confirmed grant does not depend upon the issuance of a patent where the boundaries of the tract have been clearly defined and can be identified, but it is nevertheless the duty of the land department to fix by appropriate surveys the boundaries designated by the confirmatory act, especially where such survey is essential to the accurate segregation and delimitation of the private claim from the public lands. As said by the court in *Stoneroad v. Stoneroad* (158 U. S., 240, 250)—

the idea that the act, whilst confirming the title, did not contemplate a survey, for the purpose of marking its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter.

It is conceded that the primary object of the law requiring a public land survey of private claims is to distinguish the public lands from private property, but to accomplish that it is necessary that a complete survey be made, so that it will definitely segregate from the grant all public land that may be found along any part of the line.

In the case of *Land Company of New Mexico* (31 L. D., 202), the Department held that (syllabus):

Where conflicting private land grants have been confirmed by Congress, each without any reference to the other, it is the duty of the land department to follow the confirmations and survey and patent each grant, leaving to the judicial tribunals the determination of all matters of priority and superiority of right to the area in conflict.

The survey made by Leonard M. Brown is therefore disapproved and set aside and you will cause a survey to be made of this grant in conformity with the recommendation of the Special Inspector, in which you concur, and you will cause the lines of said survey when made to be delineated upon the township plats of your office.

**RELINQUISHMENT PENDING CONTEST—PREFERENCE RIGHT OF
CONTESTANT.****CROOK v. CARROLL.**

The preference right given by section 2 of the act of May 14, 1880, is in the nature of a reward to an informer, and to entitle a contestant to claim the benefits of the offer thereby made it must appear that he has not only contested an entry and paid the land office fees in that behalf, but it must further appear that he has "procured the cancellation" of the entry.

Where after the filing of an affidavit of contest a relinquishment of the entry is filed and a stranger to the record is allowed to enter the land, the contestant, in instances where the allegations of the affidavit are sufficient if proven to require the cancellation of the entry, and actual notice to the contestee does not appear of record, should be notified to submit affirmative proof that the relinquishment was the result of the contest, with due notice to the second entryman, who may present any counter-showing upon this question he may desire.

Where it affirmatively appears of record that the contestee had actual notice of the contest before the filing of the relinquishment, or where notice was by publication and was posted and published in accordance with the rules of practice, or where, in the absence of record notice the contestant establishes actual knowledge of the filing of the affidavit of contest on the part of the contestee, or some one in privity with him, prior to the filing of the relinquishment, it will be presumed as matter of law and fact that such relinquishment was induced by the contest.

When the contestant shall have established to the satisfaction of the land department that a relinquishment of the entry under contest was induced by such contest, he thereby brings himself within the conditions of the offer extended to him by said act, and will be recognized to claim the privileges thereby accorded, even as against an entryman who inadvisedly secured the relinquishment of the former entry and in good faith filed the same and himself made entry of the land in ignorance of the pending contest.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 20, 1909.* (G. B. G.)

This is the appeal of Edward J. Carroll from your office decision of October 26, 1907, holding for cancellation his homestead entry for the NW. $\frac{1}{4}$ of Sec. 9, T. 3 N., R. 25 E., Pierre land district, South Dakota.

The record shows that on September 21, 1903, one Edward O'Donnell made homestead entry for this land, but that on March 14, 1906, at Shullsburg, Lafayette county, Wisconsin, he made, executed, and acknowledged in due form a relinquishment of said entry, but this relinquishment was not filed in the local land office at Pierre until October 15, 1906, on which day the said Edward J. Carroll made homestead entry for said land. In the meantime, to wit, on October 13, 1906, Eugene Crook filed affidavit of contest against the entry of O'Donnell, charging abandonment and failure to comply with all

the requirements of the statute with reference to homestead entries, but no notation of such affidavit of contest seems to have been made on the tract book, or was otherwise made of public record in the local land office, until October 17, 1906, when notice of contest on said affidavit was issued by the local office, returnable December 13, 1906. O'Donnell was personally served with this notice October 29, 1906, but no notice was given to the entryman, Edward J. Carroll. O'Donnell having no interest in the matter took no steps to defend the case, and on the date set for hearing the contestant, Crook, only appeared, and on the testimony of two witnesses sustained the allegations of his affidavit of contest. The local officers in due time recommended cancellation of the already canceled O'Donnell entry, and reported no appeal from their decision. April 16, 1907, your office directed that the entryman, Edward J. Carroll, be notified, and that he be allowed sixty days from notice within which to show cause why his entry should not be canceled for conflict with the preference right of Crook. Carroll received such notice July 28, 1907, and this was his first knowledge that the land involved in his entry was the subject of contest, or that the legality of his entry was in anywise questioned. It appears that in the meantime the entryman, Carroll, had with his family settled upon the land and made substantial and valuable improvements thereon, and he now contends that his rights are superior to those of Crook, who has expended practically nothing in this proceeding, and that if Crook's claim is sustained it will subject him to irreparable loss without fault or default on his part.

Your office in the said decision appealed from holds that the only question in dispute is one of law; that the contention of Crook must prevail, and that under all the circumstances a hearing between the parties is not warranted.

The claim of the said Eugene Crook that he is entitled to a preference right to enter the land in controversy must rest entirely upon the provisions of section 2 of the act of May 14, 1880 (21 Stat., 140, 141), as follows:

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any preemption, homestead, or timber-culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

The right given by this statute is in the nature of a reward to an informer, and the statute must be construed strictly. It is familiar law that an offer of reward conveys no right beyond the specific terms of the offer, that it may be withdrawn at any time, and that until something has been done to establish a right under the offer, a claimant takes nothing by reason thereof. "Whoever claims under such an offer must bring himself within its terms. Failing to do that, his

compensation is the consolation which comes to every citizen from the discharge of a public duty, which is the common obligation of all." *United States v. Connor* (138 U. S., 61, 65, 66).

In this case, then, to entitle Crook to claim the benefits of the offer made by said section 2 of the act of May 14, 1880, it must appear that he has not only contested the O'Donnell entry and paid the land office fees in that behalf, but it must appear that he has "procured the cancellation" of that entry.

The question arose early in the administration of this act as to the effect of a relinquishment of the entry under attack after the filing of the affidavit of contest. Section 1 of the same act had in the most positive terms provided that upon the filing in the local land office of a written relinquishment of his claim by a homestead entryman, the land covered thereby should be "held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office." So it resulted in many cases, as in the present one, that a relinquishment of a homestead entry was filed after contest had been initiated and uninformed persons were inadvertently permitted to enter the land. In that event the subsequent entryman, upon application by the contestant to make entry of the land, was called upon to show cause why his entry should not be canceled for conflict with the presumptive preferred right of the contestant, when such entryman was, on proper showing, granted a hearing in order to show that the relinquishment was not the result of the contest; and even after making such showing, strange as it may seem, the contestant was allowed to gain a preferred right by proceeding to the establishment of his charges against the entry at a hearing, although the entry involved in his contest had already been canceled upon relinquishment. This practice still obtains and was permitted in this case, but it is so manifestly illogical and incongruous that its discontinuance is hereby directed. In such cases, if the allegations of the affidavit of contest are sufficient if proven to require the cancellation of the entry, then the contestant, in instances where actual notice to the contestee does not appear of record, should be notified to submit affirmative proof that the entryman's relinquishment was the result of the contest, with due notice to the second entryman, who may present any counter-showing upon this question which he may desire to offer. In instances where it affirmatively appears of record that the contestee had actual notice of the filing of the affidavit of contest before the filing of the relinquishment, it will be presumed, as matter of law and fact, that such relinquishment was induced by the contest, and in case of notice by publication the posting and publication of the notice in accordance with the rules of practice will be treated as actual notice within the meaning of these directions. This naturally brings us to consideration of the question

of notice by construction, and upon this it should be kept in mind that the controlling question is whether such notice induced the relinquishment. It will be readily seen that such notice if not within the knowledge of the former entryman may not be said to have influenced in the slightest degree the filing of his relinquishment and was thus not a factor in procuring the cancellation of his entry. Therefore, in the absence of record notice the contestant should be given opportunity, after notice to the present entryman, to show that the former entryman or some person or persons in privity with him, had actual knowledge of the filing of the affidavit of contest, thus establishing that the relinquishment was induced thereby.

Thus, the contestant may bring himself within the conditions of the offer extended to him by section 2 of the act of May 14, 1880, and show to the satisfaction of the land department that he has "procured the cancellation" of the entry. If this be shown, his claim must prevail even as against an entryman who has inadvisedly secured the relinquishment of the former entry and in good faith filed the same and himself made entry of the land in ignorance of the pending contest. Were the rule otherwise, there would be little inducement to bring contests, and section 2 of the act of May 14, 1880, would be practically nullified. Applying these observations to the facts of this case, we have the filing of a contest affidavit by Crook followed by the filing of the relinquishment of the entry sought to be contested, its acceptance and the allowance of an entry by Carroll two days later without apparent knowledge of the pending affidavit of contest. So far as is shown or suggested by the record, Carroll had no actual notice of the fact that Crook's affidavit of contest had been filed, although it appears he made diligent inquiry in respect to this of the local office. Neither is it shown that O'Donnell's agent in the transaction involving the sale of the relinquishment had such notice. It is suggested in brief of counsel for Crook that this agent did in truth and in fact know that the affidavit of contest had been filed, but no proof of this allegation has been offered.

Under this state of case and in accordance with what has been hereinbefore said, the decision appealed from is modified, and your office is directed to allow the Carroll entry to stand, unless, within thirty days after notice hereof, the contestant, Crook, files his duly corroborated affidavit that O'Donnell, or some person or persons in privity with him in the sale or purchase of his relinquishment, had actual knowledge of the filing of the affidavit of contest at the time said relinquishment was filed in the local land office, in which latter event a hearing will be ordered upon this question alone, with due notice to all interested parties.

All rules inconsistent herewith, which have been laid down in numerous departmental decisions, are hereby modified to conform to

these directions, and the cases themselves will be no longer followed in the administration of the act of May 14, 1880. You will submit for departmental approval a draft of regulations embodying such changes in existing regulations as may be deemed necessary to carry this decision into full effect.

OKLAHOMA PASTURE AND WOOD RESERVE LANDS—EXTENSION OF
TIME FOR PAYMENTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1909.

REGISTER AND RECEIVER,
Lawton, Oklahoma.

GENTLEMEN: Your attention is called to that part of the act of Congress approved February 18, 1909 (Public—No. 241), relating to the extension of the time of payment for pasture and wood reserve lands in your district, which reads as follows:

That the time within which all unpaid payments which have heretofore, or may hereafter, become due and payable under the act . . . approved June fifth, nineteen hundred and six, and the act . . . approved June twenty-eighth, nineteen hundred and six, and the act . . . approved March eleventh, nineteen hundred and eight, be, and the same is hereby, postponed and extended for one year from the date on which such payments are now by law required to be made: *Provided*, That as a condition precedent to said extension in each case the settler shall pay to the Secretary of the Interior, to be held in trust by him for the benefit of the Indians entitled thereto, four per centum on the amount of such deferred payments where the settler had no preference right, and five per centum on the amount of the deferred payment where such settler was given a preference right, but the payment of said five per centum shall be made in lieu of the interest payment required by said act of June twenty-eighth, nineteen hundred and six.

1. One extension and but one extension of time for the payment of installments of purchase money for said lands which become due for the first time after February 18, 1909, can be obtained by the payment of the required commission.

2. In all cases where extensions have already been obtained under the act of March 11, 1908, an additional extension of one year from the date when the original extension expired or will expire, can be obtained by the payment of the required commission.

3. All payments which became due before February 18, 1909, for which an extension of time was not obtained under the act of March 11, 1908, may be extended under these regulations for one year from the date on which they became due, but they can not be extended longer than one year from that time.

4. All persons who obtain extensions of time authorized by these regulations under entries for wood reserve lands or for pasture lands which were outside of what was formerly known as "Pasture No. 3" must pay your office a commission of four per centum on the installments extended.

5. All persons who obtain extensions of time under these regulations under purchases of lands formerly within "Pasture No. 3" must pay at your office five per centum on the amount of the installments extended and interest accrued thereon. At the expiration of the time to which such installments are extended under these regulations the purchaser will be required to pay both the installments and the interest extended, but will not be required to pay interest on either the installment or the interest due during the year for which the payment is extended, since the payment of the five per centum commission at the time the extension is obtained is to be considered as being a payment in lieu of interest for that year.

6. You are directed to at once mail a copy of these regulations to each person holding any of the lands mentioned, and in all cases where payments are due at the time the copies are mailed, you will, after thirty days from the mailing of the copies, report the entries to this office for cancellation and the forfeiture of all payments theretofore made, if the payments due at the date of the mailing of the copies have not been paid at that time, or an extension of time obtained where an extension of time can be obtained under these regulations.

7. In all cases where installments are not paid when they hereafter become due, and no extension of time is obtained under these regulations, you will at once notify the persons holding the land that if such payments are not made, or extensions obtained, in cases where they can be obtained, within thirty days from the date of the notice, their entries will be reported to this office for cancellation and the forfeiture of all moneys theretofore paid.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

PETER A. C. HAUSMAN.

Motion for review of departmental decision of December 28, 1908, 37 L. D., 352, denied by First Assistant Secretary Pierce, March 22, 1909.

HOMESTEAD—HEIRS—COMMUTATION—RESIDENCE AND CULTIVATION.

WILSON v. HEIRS OF SMITH.

The heirs of a deceased homestead entryman who during his lifetime failed to comply with the law, may complete the entry by either residing upon or cultivating the land for the full period of five years, if sufficient of the lifetime of the entry remains for that purpose; or may commute upon a showing of residence and cultivation for fourteen months, but can not commute upon a showing of cultivation alone.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 22, 1909.* (G. J. H.)

January 19, 1901, David Smith made homestead entry for lots 1 and 2, Sec. 3, and lot 4 and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 2, T. 2 N., R. 24 W., Lawton, Oklahoma.

July 8, 1906, the entryman died.

August 8, 1907, Neeley R. Smith, one of the heirs of the entryman, submitted final proof, against which George I. Wilson filed a protest, charging that neither the entryman during his lifetime, nor his heirs after his death, had ever established residence upon the land.

The local officers dismissed the protest, on the ground that the charge "is not sufficient upon which to order a hearing, and even though admitted, does not affect the validity of the entry."

Upon appeal by protestant your office sustained the action of the local officers, holding that:

The proof submitted . . . only shows compliance with law for a period of about thirteen months, whereas in a case of this character, as above shown, the proof by the heirs must show compliance with law for a period of five years, or the heirs may make commutation proof for fourteen months and payment for the land. In view of the fact, however, that more than seven years have expired since date of entry, and the party has failed to file satisfactory proof, the entry is hereby held for cancellation.

Your decision is accordingly sustained with the usual right of appeal, but the heirs may be allowed sixty days within which, if they so desire, to submit commutation proof showing fourteen months' residence upon, or cultivation of, the land and making payment therefor at the Government price per acre. Your rejection of protest is also sustained with right of appeal.

The protestant has further appealed to this Department from so much of your office decision as allows the heirs further opportunity within which to submit commutation proof and make payment for the land.

The record shows that the entryman never established residence on the land, but from the date of entry until his death lived with his son, Neeley R. Smith, on adjoining land; that the son cultivated about 35 acres of the land and raised crops thereon for about six years; that no house was ever built upon the land and the only im-

provement thereon is a fence worth about \$40; and that up to the date of the submission of final proof the heirs had never established residence upon the land, but had cultivated a portion of it for thirteen months.

In *Heirs of Stevenson v. Cunningham* (32 L. D., 650) it was held (syllabus):

Upon the death of a homestead entryman the right to the entry goes to his . . . heirs . . . free from defect on account of any default on the part of the entryman in the matter of residence or otherwise, and the . . . heirs . . . may complete the entry by either residing on the land or cultivating the same for the required period, but need not do both.

In the later decisions of *Meeboer v. Heirs of Schut* (35 L. D., 335) and *Johnson v. Heirs of Malone* (35 L. D., 522) the *Stevenson-Cunningham* decision was thoroughly analyzed and construed and it was held that while the heirs of a deceased entryman took the entry free from any default on the part of the entryman, it is incumbent upon them, in submitting proof, to show that the requirements of the statute have been fully met—that is, that they have either resided upon or cultivated the land for the entire period required by the homestead law, or for such period as, added to the period during which the entryman had complied with the law, would aggregate the full period of five years.

In the present case the entryman had utterly failed in the matter of residence, and as a consequence there was no compliance with law on his part for which the heirs could receive credit in making up the full period required by law. It was therefore incumbent upon them to either reside upon or cultivate the land for the full term of five years. As about five and one-half years from the date of the entry had elapsed at the time of the entryman's death, it is apparent that it was impossible for the heirs to comply with the law for the full period in the remaining year and a half of the statutory life of the entry. The only thing they could have done to save the entry would have been to reside upon and cultivate the land for fourteen months and then commute. This, however, they did not do, but proceeded to cultivate only. By the express terms of section 2301, Revised Statutes, commutation can only be allowed upon a showing of both "residence and cultivation" for fourteen months. As before stated, at the date of submitting proof there had been no residence on the part of the heirs, and as there was then remaining only a little more than five months of the statutory lifetime of the entry, it is evident that they could not thereafter have resided upon the land for the requisite period to entitle them to commute.

The land department has no authority to extend the statutory lifetime of an entry, or to authorize residence subsequent to the expiration of that period as a basis for commutation.

Your office decision is affirmed in so far as it rejects the proof already submitted and holds the entry for cancellation, but is reversed in so far as it affords the heirs opportunity to submit further proof with a view to commutation.

RECLAMATION ACT—APPLICATIONS FOR WATER RIGHTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 22, 1909.

WATER RIGHT APPLICANTS AND REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: In order to avoid discrepancies in areas and resulting payments and the acceptance of applications for tracts not designated as lands for which water can be furnished, the following instructions, supplemental to those of April 4, 1906 (34 L. D., 544), are issued:

1. When practicable, all applications for water rights, both by homesteaders who have made entries of lands withdrawn and by private owners of lands embraced within a reclamation project, should be submitted by the applicants to the project engineer, United States Reclamation Service, for his examination and approval, before the applications are filed in the local land offices. In such cases the project engineers will endorse their approval upon the application forms if found correct, or point out defects and suggest corrections if any are required.

2. Where, because of lack of time, distance, or necessity of submitting the water right applications with applications to make original homestead entries, etc., it is not practicable to have the water-right applications examined and approved by the project engineer prior to filing in the local land offices, the water-right applications must be executed and filed in the local land offices in duplicate. Registers and receivers will suspend action in such cases and daily forward to the proper project engineer one copy of each of such water-right applications for examination and return by the engineer within fifteen days, approved by him, or with defects indicated and corrections suggested if not in form for approval. In the latter case the applicant should be promptly advised and allowed thirty days to make the necessary amendments, in default of which the application will be rejected.

3. The Reclamation Service will advise its project engineers that their approval will be regarded as certifying to the correctness of the

following matters: (a) That the land described is subject to water-right application under the project; (b) that the irrigable acreage shown is correct in accordance with the public notices, the official plats, and instructions approved by the Secretary of the Interior; (c) that the number of acre feet per annum to be furnished is correctly stated; (d) that the amount of the building charge is correctly stated; (e) that the number of annual instalments is correctly stated.

4. These regulations are designed to aid the applicants in presenting water-right applications which will be correct in form and which contain matters essential to the approval of their applications; also, to aid the registers and receivers of local land offices in the consideration of such applications; and registers and receivers are, therefore, enjoined to use both care and diligence in enforcing the above requirements.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

DESERT LAND—CHANGE IN CHARACTER OF LAND—PROOF OF RECLAMATION.

PEDERSON *v.* PARKINSON.

Lands that one year with another for a series of years will not without artificial irrigation produce reasonably remunerative crops are desert within the meaning of the desert land law.

Lands situated within a notoriously arid or desert region, and themselves previously desert within the meaning of the desert land law, do not necessarily lose their character as desert lands merely because of unusual rainfall for a few successive seasons their productiveness was increased and larger crops were raised thereon; and under such circumstances a strong preponderance of evidence will be required to take them out of the class of desert lands.

One who makes desert entry of such lands must however clearly show, in submitting proof, not only that he has the right to a sufficient supply of water to successfully irrigate the lands, and that the system of ditches is adequate for that purpose, but also that the necessary supply of water has been actually used on said lands in a manner to prove the beneficial results.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 24, 1909.* (C. J. G.)

An appeal has been filed by defendant in the case of Anton Pederson *v.* Frederick Parkinson from the decision of your office of April 23, 1908, sustaining the action of the local officers in holding for cancellation his desert-land entry for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 28, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 33, T. 6 N., R. 41 W., Blackfoot, Idaho.

The papers were transmitted here by your office September 30, 1908, since which time the parties have further presented their respective claims at an oral hearing.

The entry was made August 1, 1905, the applicant filing with his declaration evidence showing the tract to be desert land, and stating that he expected to obtain the water supply with which to irrigate said tract from Moody and Lyman creeks. Affidavit of contest was filed by Pederson June 14, 1907, in which he alleged that:

Parkinson made said entry fraudulently and unlawfully, in that the said entire tract was not at the date of said entry desert land or subject to entry as such and is not desert land at this time; that said tract at the time of entry and now will produce good and profitable crops of hay and grain without artificial irrigation year after year during ordinary seasons; that no artificial irrigation is required for the cultivation of good and profitable crops thereon, and surrounding lands produce yearly such crops without artificial irrigation.

Hearing was had July 30, 1907, before a United States commissioner at St. Anthony, Idaho, where both parties appeared and submitted testimony. The local officers rendered decision finding the land to be non-desert in character and recommended the cancellation of Parkinson's entry. Their decision was upon appeal therefrom affirmed by your office.

The land in controversy is situated upon what is known as the Rexburg bench, comprising several thousand acres. It is in what has always been considered, at least up to a few years ago, an arid or desert region. Many desert-land entries have been made for lands of precisely or substantially the same character as that in controversy, some of which have been patented. Lands in the vicinity have been segregated under the Carey Act. It appears that comparatively few of the lands on this bench were filed on prior to 1900, and probably the bulk of those filed on were entered during and since the year 1905. Up to 1895 or 1896 it was undoubtedly the general belief that the raising of crops in that section of the country without irrigation was impossible. In such belief thousands of dollars were spent in the construction of canals and ditches to irrigate the lands, but most of the irrigation was along the streams and of the lower lands. Prior to 1905 comparatively few attempts were made to utilize these lands for agricultural purposes, and there was apparently no doubt entertained as to their desert character, and they were generally so regarded. Persons who attempted to raise crops without artificial irrigation met with indifferent success, the general experience being that profitable crops could not be grown without such irrigation. Since that year, owing to changed or changing climatic conditions in the way of unusually heavy rainfalls, it has been possible to raise fairly good crops on these lands without artificial irrigation, or by the so-called *dry farming* process. This fact apparently led to the belief in the minds of some that the lands in this region, about whose char-

acter no doubt existed before, are in reality not desert and therefore not subject to entry under the desert-land law. It appears to be conceded that the lands on the Rexburg bench, or for that matter in that region, are all substantially of the same character.

The hearing in this case was directed mainly to showing the character of the land embraced in Parkinson's entry—whether desert or non-desert within the meaning of the law. No portion of said land had been cultivated to crops prior to the hearing, the evidence merely showing that some plowing had been done thereon in the spring of 1907; hence, as to actual results in the way of crops, the evidence refers to operations and experiences on adjoining and neighboring lands.

The general rule heretofore applied for the determination of the desert character of lands is substantially as follows: Lands that one year with another for a series of years will not without irrigation produce reasonably remunerative crops are desert within the meaning of the law. The testimony in this case may be said to cover approximately a period of ten years, extending from 1896 to 1907, and refers to the actual experiences or to the knowledge of such experiences of those who have attempted to grow crops on the lands of this bench without irrigation. As stated, prior to the year 1905 very few of these lands had been cultivated, and the results obtained did not warrant the belief that profitable crops could be raised without irrigation. The crops for the year 1907 had not been harvested at the date of the hearing, so that of the years when there were unusual rainfalls the hearing really covered only two or three crop seasons. For these seasons the evidence shows that many were able to raise remunerative crops by dry farming, although some witnesses testified that for even those years, cost of production considered, they were not paid for their trouble. Nearly all of Parkinson's witnesses testified positively that these lands are desert in character, and as such their cultivation one year with another without artificial irrigation would not be remunerative. In fact, the principal witness for contestant Pederson, when asked whether cultivation of these lands without irrigation had as a general rule been successful, stated that he was hardly in position to say whether it had been a paying prospect or not—it was almost impossible to say. The testimony taken as a whole leaves grave doubt whether even during the wet years crops raised on this bench were as a general rule a paying proposition. It was shown that grain grown on dry farms is of an inferior quality, especially wheat, to that grown on irrigated lands. It is of lighter weight, produces fewer pounds of flour to the bushel, and brings less price in the markets. Sometimes the quality of the grains was fair. Other seasons they were refused by millers except

for feed. A great many crops planted were never harvested for the reason that they were practically worthless. Many persons threshed their crops grown on these lands for the first time the year prior to the hearing, and when paying crops are referred to in the testimony, it generally means crops that were raised the year or two immediately preceding the hearing, or during the seasons of unusual rainfall. A witness with equal experience with others stated that for year after year he had cultivated his land at a loss, while others testified they were unable to make a living on their lands up to the last two years prior to the hearing, being compelled to engage in other business for a livelihood; that for ten years those of 1905 and 1906 were the only years when they were able to raise profitable crops. Then, too, on the question of the quantity of grain required to constitute a paying crop, some stated that twenty bushels of wheat per acre would, taking the total cost of production in that region into consideration, be a losing proposition. Prior to 1905 the average production per acre fell far short of twenty bushels. And even for the wet years, while some succeeded in growing paying crops by dry farming, there were many others whose labors were not remunerative. Taking the whole record even for those years, successive and paying crops appear to have been the exception rather than the general rule. Especially is this true in the case of individual claimants for a limited area of land. Possibly persons of large means, or companies controlling large tracts, were able to obtain by means of advanced methods remunerative returns for the capital and labor expended. The testimony developed the further facts that summer fallowing is necessary to successful farming on these lands, so that when this method is employed the average yield per acre would have to be divided by two, thus reducing the average yearly yield to half. It is practically admitted on all sides that attempts to grow crops of hay on these bench lands, such as alfalfa or lucern, very necessary crops to the farmers of that region, resulted in most instances in utter failures. But, even conceding that remunerative crops were raised on these lands without irrigation during the recent years of unusual rainfall, the question is presented whether that fact, in face of the practically unbroken record of failures during the preceding seven or eight years, necessarily changes said lands from desert to non-desert lands. In other words, that the mere fact that because of unusual rainfall for two or three successive years out of ten, increased crops were raised, changes the character of lands that for a "series of years" could not be made to produce remunerative crops without irrigation into non-desert lands within the meaning of the law. Moreover, it is believed that it would be an unwise policy to invite the taking up in small quantities of these lands by people without means in the belief that said

lands could be successfully and profitably cultivated without irrigation under the dry farming process; for, in the event of the return of normal rainfall, the result in that whole area would probably be little less than disastrous.

As hereinbefore stated, the land in controversy had not at time of hearing been cultivated to crops. Only prairie grass and sage brush were growing upon it, but no grass that produced a natural growth of hay. The land in controversy receives no moisture from sub-irrigation. Moody Creek, although it runs across the northeast corner, is in a gulch or canyon, and is estimated to be from one hundred to two hundred feet below the general surface of said land. So that without artificial irrigation attempts to raise remunerative crops on the land would be wholly dependent upon continuation of exceptional rainfalls of the past few years. In an article on "Dry-Land Farming in the Great Plains Area," in the Yearbook of the Department of Agriculture for 1907, it is said:

During the last two or three years there has been rather more than the average amount of rainfall over the larger part of the semi-arid region, and many people acquainted with present conditions firmly believe that the climate of this region is rapidly becoming more humid. This belief is without foundation in fact, and it is surprising that it should exist, for the precipitation records for the whole country are given wide publicity; but since this idea is generally held and has become widely advertised, it becomes important to emphasize the fact that there is no adequate basis for hoping that the climate of the arid West is undergoing any appreciable change as regards precipitation.

* * * * *

It is the frequent observance of these especially favorable conditions during past years that has led people to believe that the climatic conditions were actually changing and that in time the climate would reach a stable condition fairly approximating the very favorable conditions that have sometimes prevailed. While such a pleasing hope may in some instances serve as a stimulus to action, in many other cases it will serve to encourage people in entertaining hopes that will never be realized. The only safe rule when considering climatic conditions in this or any other area is that "what has been will be" so far as climatic conditions are concerned. If destructive and devastating droughts have occurred in the past in any given area, it is probable that they will recur in the future. . . .

Since 1894 there has been a somewhat regular increase in the annual precipitation throughout the Great Plains area, until in 1905 it reached the highest point recorded by the Weather Bureau, but only very slightly in excess of the precipitation of 1883. This increase in precipitation which made the agricultural conditions more favorable, together with the demand for cheap farm lands, had the effect of causing these large land companies to exploit what is now generally known as "dry farming."

No doubt methods have been devised and are in practice through this arid region, aided by the unusual rainfalls of recent years, whereby the moisture of the soil can be conserved and crops raised under conditions that have in the past proved absolutely prohibitive

of agricultural production. But, as said in the Agricultural Department article referred to—

the exploiting of dry farming on the Great Plains has been carried on during a period of unusually heavy rainfall. In all probability droughts as severe and as long continued will occur in the future as have occurred in the past. Then, and not until then, will these methods be subjected to the decisive test.

Careful examination of the entire record leaves a pronounced impression that it has not been shown, aside from the few exceptional years referred to, which can not be accepted as decisive of their character, that these are such lands as come within the definition adhered to by the land department during many years as to what are and what are not desert land. A showing that crops, even remunerative ones, have been grown on lands for a few seasons under unusual conditions as to rainfall, does not conclusively prove their non-desert character. Where lands are situated in a notoriously arid or desert area, a large portion of which have been entered under the desert-land law, and which have in fact previously been desert in character, their productiveness in a few exceptional years without irrigation does not necessarily take them out of the classification of lands desert in character within the law. Under such circumstances, at least a strong preponderance of evidence should be required to establish their non-desert character. Perhaps, time may demonstrate, if favorable conditions should continue, that these lands are non-desert—that is, that they will one year with another for a series of years produce profitable crops without artificial irrigation. Suffice it to say no such showing has been made in this contest as calls for the cancellation of the Parkinson entry, made at a time when it had not been demonstrated that successful crops could be grown on similar lands at all, and in the belief, as it appears, that the land embraced therein was in fact desert in character.

Notwithstanding Pederson's contest affidavit contained no allegation as to the source and availability of the water supply to irrigate the land in controversy, yet testimony was introduced by him at the hearing on that point, and both the local officers and your office make findings in relation thereto. In the absence of charges bearing on the question of water supply, it is clear that Parkinson was not required to meet such testimony. So that even though it were material and necessary to determine that question at this time, it could not be done upon the present record. As a general rule the matter of the availability and sufficiency of water supply in respect to desert-land entries is one to be shown by entrymen when they come to submit their final proofs. They assume any risks in that regard when they make their entries.

In this connection it may be stated that the very fact that it has been possible to grow remunerative crops upon these lands without

artificial irrigation, renders it of the utmost importance to exercise the greatest care and scrutiny in passing upon final proofs, to see that entrymen for such lands not only have a right to a sufficient supply of water to successfully irrigate their lands and that the system of ditches is adequate, but also that the necessary supply of water has been actually used on said lands in a manner to prove the beneficial results.

The decision of your office herein is reversed, the contest dismissed, and, in the absence of other objection, Parkinson's entry will be held intact, subject to compliance with law.

COAL LANDS—SURFACE RIGHTS OF ENTRYMEN—ACT OF MARCH 3,
1909.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: The following instructions are issued for your guidance in the administration of the act of Congress approved March 3, 1909, "for the protection of the surface rights of entrymen" (Public—No. 323), a copy of which will be found at the end of these regulations.

PURPOSE OF THE ACT.

1. As indicated by its title and as plainly appears from its context the act was designed to protect the rights of persons who in good faith enter, under nonmineral laws, public lands which are subsequently classified, claimed, or reported as being valuable for coal; and the act applies not only to entries made prior to the passage thereof but also to entries made subsequent thereto, provided only that the land entered was classified, claimed, or reported as being valuable for coal after the date of entry.

ELECTION.

2. Under the provisions of this act all persons who in good faith locate, select, or enter, under the nonmineral laws, lands which are, subsequent to the date of such location, selection, or entry, classified, claimed, or reported as being valuable for coal, may elect, upon making satisfactory proof of compliance with the laws under which they claim, to receive patents upon their location, selection, or entry, as

the case may be, such patent to contain a reservation to the United States of all coal in the lands and the right of the United States, or anyone authorized by it, to prospect for, mine, and remove the coal in accordance with the conditions and limitations imposed by the act.

3. Upon receipt of these instructions registers and receivers will promptly advise, by registered mail, each locator, selector, or entryman having a claim falling within the provisions of the act that he will be allowed sixty days from notice within which to file in the local land office his election to take patent for the land, exclusive of the coal deposits contained therein, or to file a denial that the land contains coal of workable value and request a hearing to determine that question. The notice should be given and the election made on the accompanying forms.

4. Upon receipt of election to take patent, exclusive of the coal in the lands, and upon satisfactory proof of compliance with the law under which the claim is based, patent will issue upon such nonmineral location, selection, or entry containing the reservation, condition, and limitations prescribed in the act. In such cases the owner under the patent may mine coal from the land for his own use only up to and including the time of the disposal of the coal by the United States to some other party.

5. If, after notice and upon the expiration of the sixty days allowed herein, no action indicating an election is taken by the party in interest, such failure to take action will be considered an election to receive patent which will contain a reservation to the United States of all the coal, and thereafter such entry will be treated accordingly.

HEARINGS—BURDEN OF PROOF.

6. Where locators, selectors, or entrymen file denials of the coal character of the land, together with statements under oath as a basis for hearing, the register and receiver will forward all papers to the General Land Office, and if upon consideration the land is reclassified as noncoal the parties will be so advised and the cases allowed to proceed to final entry and patent, if otherwise regular. If reclassification is not made in such cases, hearing will be ordered through the register and receiver, of which all parties and also the chief of field division of special agents will be duly advised.

7. In all cases where it appears that the land was classified, claimed, or reported as being valuable for coal subsequent to the date of the nonmineral entry involved, the burden of proof at the hearing will be upon the United States to show that the land included in the location, selection, or entry is chiefly valuable for the coal deposits therein. However, in those cases where nonmineral entries have been

made subsequent to the date on which the land was classified, claimed, or reported as being valuable for coal, the burden of proof will be upon the nonmineral entryman to show that the land does not in fact contain valuable deposits of coal. Special agents will conduct hearings on behalf of the Government and cross-examine the entrymen and other witnesses in all cases.

8. Upon the termination of a hearing the register and receiver will render a decision, as in other cases, and at the proper time forward the testimony and other papers to the Commissioner of the General Land Office.

9. In any case where a special agent, after field examination and prior to hearing, is of the opinion that the classification of the land is incorrect, he will immediately forward to the General Land Office a report to that effect, together with all the papers in the case and a statement of his reasons for such opinion. In such cases the hearing will be postponed, of which due notice shall be given the entryman, and remain suspended until conclusion is reached by the Secretary of the Interior regarding the reclassification of the lands. If reclassification is denied, the hearing will then proceed.

CASES WITHIN PURVIEW OF LAST SENTENCE OF ACT.

10. It will be observed that the last sentence of the act provides that where final proof has heretofore been made, or shall hereafter be made, showing good faith and satisfactory compliance with the law under a location, selection, or entry made prior to classification, or report of coal character, the locator, selector, or entryman in such case will be entitled to a patent without reservation unless, at the time of such final proof and entry, it shall be shown that the land is chiefly valuable for coal. Therefore in all cases where such locations, selections, and entries have proceeded to final proof and entry, no hearings will be ordered except in cases where reports or charges are made showing that the proof could not have been made in good faith because of the known coal character of the land, or because of some other fact tending to establish a want of good faith in the claimant.

This provision of the act means that where a nonmineral claim has in good faith and after due compliance with law been carried to final proof and entry, the mere fact that the land has been classified, claimed, or reported as being valuable for coal will not in itself prevent the claimant from receiving a patent without a reservation to the United States of the coal, but of course if the land was prior to final proof known (to the entryman, locator, or selector, or generally in the vicinity) to be coal land, the nonmineral location, selection, entry, or proof must necessarily have been made in bad faith, and upon that ground such nonmineral claim may be attacked even though it may have proceeded to final proof and entry.

11. In order that due protection may be afforded the interests of the Government, it will be necessary for registers and receivers, where application is hereafter made to submit final proof for lands classified, claimed, or reported as containing coal, to set the date for making such proofs sufficiently far in advance, after consultation with the chief of field division, so that an agent of the Government may be able to appear at the time the proof is approved and show that the land applied for is chiefly valuable for the coal contained therein, if such be the fact.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

Form Approved by the Secretary of the Interior March 25, 1909.

DEPARTMENT OF THE INTERIOR.

NOTICE OF RIGHT OF ELECTION.

[Act March 3, 1909.]

U. S. Land Office _____.

No. _____.

19—.

SIR: Your attention is directed to the provisions of the act of March 3, 1909, on the back hereof, and you are hereby allowed sixty days from notice within which to file in this office your election to take patent for the lands embraced in your location, selection, or entry, No. _____, made _____, 19—, for _____ of sec. —, T. —, R. —, such patent to reserve to the United States all coal in the lands with the right of the United States or persons authorized by it to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of said act, or to deny the existence of known deposits of valuable coal upon the land at date of final proof and entry, in which event you must file in this office, within the time prescribed, evidence in the form of affidavit statements by persons familiar with the lands, preferably mineral experts or practical miners, alleging the lands to be noncoal in character, with the reasons therefor. If you fail to, within sixty days from receipt of this notice, file your said election, or to deny the existence of known deposits of valuable coal in the land, patent will issue, on submission of final proof satisfactory in other respects, reserving to the United States all the coal in the land.

Respectfully,

_____,
Register.

_____,
Receiver.

ELECTION TO RECEIVE PATENT UPON NONMINERAL CLAIM EXCLUSIVE OF ANY DEPOSITS
OF COAL IN THE LAND.

STATE OF ———, County of ———, ss:

I, ———, of town of ———, county of ———, State of ———, who on ———, 19—, made location, selection, or entry No. ———, for the ——— of sec. ———, T. ———, R. ———, being duly sworn, do hereby *elect*, upon submission of satisfactory proof of compliance with law under which my claim was initiated, to receive patent for the lands, which patent shall reserve to the United States all of the coal in said lands, with the right of the United States, or any person authorized by it, to prospect for, mine, and remove the coal from same in accordance with the conditions and limitations of the act of March 3, 1909, public No. 323.

In accordance with above election, I hereby authorize the proper officer or officers of the United States, upon submission of satisfactory final proof upon my location, selection, or entry, to issue final certificate or other paper as basis for patent, containing the reservation of the coal hereinbefore described, and to issue patent in accordance therewith.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known or has been satisfactorily identified before me by ———; and that said affidavit was duly subscribed and sworn to before me at my office in ———, this ——— day of ———, 19—.

(Official designation of officer.)

NOTE 1.—This affidavit of election may be executed before any officer authorized to administer oaths and possessed of a seal.

NOTE 2.—The attention of parties in interest is directed to the provisions of the act of March 3, 1909, copy of which is printed on the back hereof.

[PUBLIC—No. 323.]

AN ACT For the protection of the surface rights of entrymen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided*, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any

locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved, March 3, 1909.

MILITARY BOUNTY LAND WARRANTS—SURVEYOR-GENERALS' CERTIFICATES.

D. N. CLARK.

The Department declines to recognize any right on the part of purchasers of military bounty land warrants or surveyor-generals' certificates to locate them upon lands not subject to such location under departmental decision in the case of Lawrence W. Simpson, merely because the warrants or certificates were purchased prior to that decision upon faith of the rulings of the Department in the cases of Victor H. Provensal, J. L. Bradford, and Charles P. Maginnis.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, March 26, 1909.* (E. F. B.)

Petitioner, D. N. Clark, seeks to secure a modification of the rulings of the Department so far as they deny to purchasers of military bounty land warrants the right to locate them upon lands that were subject to private cash entry at the date of the act of March 2, 1889 (25 Stat., 854), where the warrant had been purchased at a time when, under the decisions of the Department then in force, location could be made with military bounty land warrants.

Reference is made to the cases of Victor H. Provensal (30 L. D., 616), J. L. Bradford (31 L. D., 132), and Charles P. Maginnis (Ib., 222), in which it was held that military bounty land warrants and surveyor-generals' scrip may be located on lands that were subject to such location at the date of the passage of the act of March 2, 1889, and to the case of Lawrence W. Simpson, decided January 31, 1907 (35 L. D., 399), and June 20, 1907, on review (Ib., 609).

In the case last mentioned it was held that the act of March 2, 1889, withdrew *all* public lands, except in the State of Missouri, from private cash entry, without exception or reservation, either express or implied. Hence no location of such warrants and scrip can be allowed on lands not subject to private cash entry at the date of the location, especially in view of the express purpose of Congress indicated in the act of December 13, 1894 (28 Stat., 594), to confine the

location of bounty land warrants and surveyor-generals' scrip to land subject to private cash entry at the date of the location and to give them a cash value by authorizing the use of them in the purchase of lands entered under the general land laws, and for lands sold at public outcry.

In the case of Roy McDonald (36 L. D., 205) the soundness of the rule in the Simpson case was not questioned; but it was sought to have the decision so far modified as to give protection to locations made in good faith upon the adjudications of the Department, and to have all rights initiated thereunder protected, notwithstanding the change of ruling in the Simpson case. That decision was so far modified as to give protection and recognition to *all locations completed prior to June 20, 1907*, upon faith in the holding of the Department, in which no question as to the right under the location is raised, except that the land is without the limits of the State of Missouri, including all *locations and entries* made prior to June 20, by innocent purchasers of warrants or scrip who acquired their title after the decision in the Provensal case.

Petitioner alleges that he purchased military bounty land warrant No. 14-493 prior to the original decision in the Simpson case, and he seeks to have the recognition of the right given by the Roy McDonald decision extended to purchasers of warrants who purchased the same before the date of the first decision in the Simpson case, and after the decision in the Provensal case.

That question was considered at the time the decision in the case of Roy McDonald was rendered, and it was then determined that recognition should only be given to *locations* completed upon faith in the holding of the Department where the location was valid in all other respects save as to the location of the land entered, and to those who had "*entered or located lands*" with warrants or scrip purchased in good faith between the dates above mentioned; that the purchase of the warrant was a matter resting solely between the vendor and vendee, but that the allowance of a location with such warrant was an act of the land officers of the Government, and should be protected as far as executive authority may be exercised.

The protection thus given to such locations was recognized and confirmed by the twelfth section of the act of May 29, 1908 (35 Stat., 465), which declared legal all locations and entries that could be approved for patent under the ruling of the Department in the case of Roy McDonald. As Congress, at the time of the passage of that act, knew of the conditions that rendered such legislation necessary, it is presumed that the full extent to which such protection should be given was expressed by the act, and that implies that no other right to locate a warrant upon lands not subject thereto

can be recognized solely because of the purchase of said warrant upon faith in the decisions of the Department.

The petition is denied, and is transmitted to be placed in the files of your office.

ISOLATED TRACTS—NEZ PERCE INDIAN LANDS—ACT FEBRUARY 6, 1909.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 27, 1909.

REGISTER AND RECEIVER,
Lewiston, Idaho.

GENTLEMEN: Your attention is called to the act of February 6, 1909 (Public—No. 212), which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the law providing for the sale of any isolated or disconnected tract or parcel of the public domain is hereby extended and made applicable to any isolated and unappropriated public lands embraced within the Nez Percés Indian Reservation: Provided, That for agricultural lands purchasers under this act shall pay not less than three dollars and seventy-five cents per acre, and for lands valuable for stone and timber they shall pay not less than five dollars per acre.

Circular of instructions, approved December 27, 1907 (36 L. D., 216), will be followed in applications for the offering of land within said reservation, except that tracts valuable for stone and timber may be offered under this act, and be sold at not less than five dollars per acre. Special care must be exercised in the preparation of applications to purchase, so that the amount and value of timber or stone as to each subdivision of an isolated body of land is clearly stated. If the offering of a body of land is applied for, part of which contains timber or stone, and part is agricultural land, the character thereof will be determined by legal subdivisions. Each isolated body will be offered as a whole, but the total minimum price of such body will be determined by multiplying the price per acre, to be determined by its character, of each subdivision, by the area thereof, and adding together the several products thus obtained.

The agricultural lands cannot be sold at less than three dollars and seventy-five cents per acre.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

PRIVATE LAND CLAIM—SMALL HOLDING—EXTENSION OF TIME.
CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 30, 1909.

Registers and Receivers of United States District Land Offices, and United States Surveyors-General, in the Territories of New Mexico and Arizona, and in the States of Utah, Colorado, Nevada, and Wyoming.

GENTLEMEN: Your attention is called to the act of February 26, 1909 (Public—No. 277), which provides:

That section eighteen of an act entitled "An act to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories," approved March third, eighteen hundred and ninety-one, as amended by the act approved February twenty-first, eighteen hundred and ninety-three, and by the act approved June twenty-seventh, eighteen hundred and ninety-eight, be, and the same is hereby, further amended by striking out the words "before the fourth day of March, nineteen hundred and one," and inserting in lieu thereof the words "before the fourth day of March, nineteen hundred and ten," so that the first clause of said section shall read as follows, namely:

"That all claims arising under either of the two next preceding sections of this act shall be filed with the surveyor-general of the proper State or Territory before the fourth day of March, nineteen hundred and ten, and no claim not so filed shall be valid."

Provided, That the extension herein granted shall not apply to lands within the limits of a confirmed grant or embraced in any entry completed under the public land laws prior to filing of a claim hereunder, nor shall its provision extend to persons holding under assignments made after March third, nineteen hundred and one.

This is an extension of time until March 4, 1910, for the filing of small holding claims arising under sections 16, 17 and 18 of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), the last previous extension of which was by the act of June 27, 1898 (30 Stat., 495), extending the time for filing such claims with the proper surveyor-general to March 4, 1901.

In receiving filings and proofs hereunder you will be governed by the provisions of the acts cited and the circulars of September 18, 1895 (21 L. D., 157), and March 25, 1896 (22 L. D., 523). The circular of May 1, 1896 (22 L. D., 524), is hereby revoked and the circular of August 2, 1904 (33 L. D., 156), is also hereby revoked in so far as publication is not required. In all cases of small holding claims you will hereafter require publication of notice as provided by circular of March 25, 1896 (22 L. D., 523).

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

R. A. BALLINGER, *Secretary.*

EXCHANGE OF LANDS WITHIN INDIAN RESERVATIONS FOR PUBLIC
LANDS—ACT OF APRIL 21, 1904.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 3, 1909.*

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: The act of April 21, 1904 (33 Stat., 211), making appropriations for the current and contingent expenses of the Indian Office and for fulfilling treaty stipulations with the various Indian tribes for the fiscal year ending June 30, 1905, provides, *inter alia*—

That any private land over which an Indian reservation has been extended by Executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant nonmineral, nontimbered, surveyed public lands of equal area and value and situate in the same State or Territory.

Preliminary to making relinquishment and selection of other lands under the provisions of the foregoing act, the owner of any private land over which an Indian reservation has been extended by Executive order, must file with the Commissioner of the General Land Office an application addressed to the Secretary of the Interior, requesting that he be permitted to surrender the lands by him owned and to select other lands in lieu thereof, pursuant to the provisions of the act of April 21, 1904 (33 Stat., 211), conformable to the rules and regulations adopted by the Secretary of the Interior and subject to the exercise of the Secretary's discretion. The land proposed to be surrendered must be accurately described by legal subdivisions if surveyed, or in the event that it is unsurveyed by such designation as will readily enable the Commissioner of the General Land Office to identify it. There may accompany such applications a brief, or argument, setting forth such reasons as the petitioner may see proper to offer, why the application to accept such land as a basis of selection under the aforesaid act should be entertained by the Secretary of the Interior. This petition, with report thereon, will be submitted by the Commissioner of the General Land Office to the Secretary of the Interior. It will then be referred by the Secretary to the Commissioner of Indian Affairs for report as to whether the described lands are needed for the use of the Indians, and such recommendations as the Commissioner may deem proper. If the Secretary is of opinion, after considering the application, that it is inadvisable for the Government to acquire the title to the land de-

scribed therein, under the provisions of the aforesaid act, he will deny the application.

If, however, the Secretary decides to entertain the proposition, subject to the further exercise of his discretion, he will so order, and thereafter selections may be made by the petitioner, or applicant, under the rules, regulations, restrictions, limitations, and conditions herein following:

PRIVATE LANDS SUBJECT TO EXCHANGE.

1. Private lands subject to exchange under the provisions of this act include all lands within the limits of an Indian reservation established by Executive order, to which the right to a patent or its equivalent has been earned by full compliance with the laws of the United States governing the disposal of said lands.

RELINQUISHMENT OR RECONVEYANCE.

2. Relinquishment or reconveyance made in pursuance of this act must be executed and acknowledged in the same manner as conveyance of real property is required to be executed and acknowledged by the laws of the State or Territory in which the land is situated. Where the relinquishment or reconveyance is made by an individual it must show whether the person relinquishing is married or single; and if married, the wife or husband of such person, as the case may be, must join in the execution of the relinquishment or reconveyance in such manner as to effectually bar any right or estate of dower, curtesy, or homestead, or any other claim whatsoever to the land relinquished, or it must be fully shown that under the laws of the State or Territory in which the relinquished land is situated such wife or husband has no interest whatever, present or prospective, which makes her or his joinder in the relinquishment or reconveyance necessary. Where the relinquishment or reconveyance is by a corporation it should be recited in the instrument of transfer that it was executed pursuant to an order, or by the direction of the board of directors or other governing body, a copy of which order or direction should accompany such instrument of transfer which must follow in the matter of its execution strictly the laws of the State or Territory in which the land is situated relating to corporate conveyances, and should bear the impress of the corporate seal.

ABSTRACTS OF TITLE.

3. Each relinquishment or reconveyance must be accompanied by a duly authenticated abstract of title showing that at the time the relinquishment or reconveyance was executed the title was in the

party making the same, and that the land was free from conflicting record claims, tax liability, judgment or mortgage liens, pending suits, or other incumbrances.

AUTHENTICATION OF ABSTRACT.

4. The certificate of authentication of the abstract must be signed by the recorder of deeds under his official seal and must show that the title memoranda is a full, true, and complete abstract of all matters of record or on file in his office, including all conveyances, mortgages or other incumbrances, judgments against the various grantors, mechanics, or other liens, *lis pendens*, and all other instruments which are required by law to be filed with the recording officer, affecting in any manner whatsoever the title to the described land. The custodian of the tax records must certify that all taxes levied or assessed against the land or that could operate as a lien thereon have been fully paid and that there are no unredeemed tax sales and no tax deeds outstanding, as shown by the records of his office. The absence of judgment liens or pending suits against the various grantors which might affect the title of the land relinquished or reconveyed, must be shown by the official certificates of the clerks of all courts of record whose judgments under the laws of the United States, or the State or Territory in which the land is situated, would be a lien on the land reconveyed or relinquished, without being transcribed other than on the court records.

LANDS SUBJECT TO SELECTION.

5. Selections under the provisions of this act are restricted to surveyed nonmineral, nontimbered, vacant unreserved public lands situated in the same State or Territory as, and equal in area and value to, the lands relinquished.

SELECTIONS.

6. Selections must be made by the owner of the land relinquished or in his name by a duly authorized agent or attorney-in-fact; and when made by an agent or attorney-in-fact proof of authority must be furnished.

APPLICATIONS TO SELECT.

7. Applications to select hereunder must be filed in the proper local land office and must specifically describe the land desired to be surrendered and that sought to be selected, the county and State, or Territory, as well as the Indian reservation, and the land district wherein situated must be given of the land relinquished. It must,

in each instance, be represented that the applicant is the owner of the land relinquished and that he desires to surrender the same to the Government and select in lieu thereof public lands under the provisions of the act of April 21, 1904 (33 Stat., 211); that the land surrendered and that selected therein described are of equal area and value; that the land selected is nonmineral, nontimbered, vacant, and unoccupied public land; that the applicant will, without cost to the Government, place the deed of relinquishment of record and extend the abstract of title to the date of the recordation thereof upon being notified so to do by the land department; and that upon the request of the Secretary of the Interior he will deposit with him a reasonable amount of money to enable the Secretary to investigate and determine the legality of the selection.

8. The application must be accompanied by a deed or relinquishment or reconveyance to the land tendered as the basis of exchange, duly executed, and a properly authenticated abstract of title to the land, by the required commissions, and proof that the relinquished land and that selected are equal in area and value; that the selected land is nonmineral, nontimbered, vacant, and unoccupied adversely to the selector therein; that the land relinquished and offered in exchange has not been made the basis of another selection, and satisfactory evidence that the Secretary has, subject to the further exercise of his discretion, entertained the selector's preliminary application to reconvey the basis land and select other lands in lieu thereof.

9. The affidavit or affidavits to support a selection under this act must be made by the selector or by some credible person possessed of the requisite personal knowledge in the premises, and may be executed before any officer qualified to administer oaths, and must be corroborated by at least one person who has no personal interest in the exchange and who is familiar with the character and condition and value of the land selected and the value of the land relinquished. This affidavit or affidavits, fully corroborated, must show that the land selected is nonmineral and nontimbered in character; that it contains no salt springs or deposit of salt in any form sufficient to render it chiefly valuable therefor; that it is not in any manner occupied adversely to the selector; and that the *lands selected and the lands relinquished are equal in area and value*, and are situated in the same State or Territory.

10. Forms of application for selection under this act and accompanying affidavits as to relinquished and selected land, as set out hereinafter in these instructions, or their equivalents, should be used. All proofs and papers necessary to complete a selection must be filed at one and the same time, except as herein otherwise specially provided.

PUBLICATIONS.

11. In all cases you will require the applicant, within twenty days from the filing of his application, to begin publication of notice thereof at his own expense in a newspaper to be designated by the register as of general circulation in the vicinity of the land and published nearest thereto. Such publication must cover a period of thirty days, during which time a similar notice of the application must be posted in the local land office and upon each and every noncontiguous tract included in the application.

12. The notice should describe the land applied for and give the date of application, and state that the purpose thereof is to allow all persons claiming the land under the mining or other laws, desiring to show it to be mineral in character or adversely occupied, an opportunity to file objection to such application with the local officers of the land district in which the land is situated and to establish their interest therein or the mineral character thereof.

13. Proof of publication shall consist of an affidavit of the publisher, or of the foreman or other proper employee, of the newspaper in which the notice was published, with a copy of the published notice attached. Proof of posting upon the land, and that such notice remained posted during the entire period required, shall be made by the applicant or some credible person having personal knowledge of the fact. The register shall certify to posting in his office. The first and last dates of such publication and posting shall, in all cases, be given.

14. Owners of lands over which an Indian reservation has been extended by Executive order will not be permitted to make selection for noncontiguous tracts in lieu of compact bodies of land situated within such reservation, unless the lands intervening have been otherwise disposed of and are not subject to such selection; and the right of selection based upon lands situated within the same section shall not be exercised for less than 160 acres. Any attempt on the part of the owner of land within a reservation to avoid this rule by making surrender to the Government by separate deeds or by a sale of part of the land to another person after the approval of these regulations will defeat the proposed transfer.

15. Fees must be paid by the applicant at the time of filing his application in the local land office at the rate of \$1 each to the register and receiver for each 160 acres or fraction thereof included in his application.

16. Selections made under this act will not be passed to patent until after four months following the filing of the application in the local office. This is to enable any person claiming an adverse right to the selected land to have full opportunity to regularly assert said right.

17. The land relinquished and the land selected must be, as nearly as practicable, equal in area, but the rules of approximation obtaining in other classes of entries will be observed.

18. Applications to select under the provisions of this act will not defeat the right of the Secretary of the Interior or of the President of the United States to withdraw or reserve the land for such proposed public purposes or uses as they may deem proper prior to the approval of the selection by the Secretary of the Interior, and the Secretary, acting within the exercise of his discretion, may reject any and all applications at any time prior to final approval of the same for any reason appearing to him good and sufficient, notwithstanding the application may have been received and certified by the local office and recommended for approval by the Commissioner of the General Land Office; but all asserted rights, based upon application or settlement subsequent to the filing of applications under the provisions of this act with the register and receiver, will be held subject thereto, and suspended pending the final determination thereof.

PRACTICE.

19. Notices of additional or further requirements, rejections, or other adverse actions of registers and receivers, the Commissioner, or the Secretary will be given, and the rights of appeal, review, or rehearing recognized in the manner now prescribed by the rules of practice, except as herein otherwise provided.

20. If application to contest or a protest or other objection shall at any time be filed against the selection or the application to select, you will forward the same to this office for its consideration and disposition.

21. Applications to enter filed subsequent to and in conflict with applications to select under this act will be suspended by you and held to await final disposition of the application hereunder, except where such subsequent application to enter is supported by allegations of prior right, in which event you will transmit the conflicting application to enter to this office.

22. Applications presented to your office under the provisions of the foregoing act, not in substantial compliance with the requirements herein made, or not accompanied by the prescribed proofs, or if the land offered as a basis of exchange is not situated within the boundaries of an Indian reservation created by Executive order, will be rejected by you. All applications sufficient in form, accompanied by the required proofs, will be accepted for transmission as hereinbefore provided, and you will note on your records against the land: "Application of ———, act April 21, 1904, pending." The register will certify the condition of your records on the applications, and you

will transmit the papers to this office promptly after the filing of the proofs of publication in your office.

23. The Commissioner will, upon the receipt of an application to select under the provisions of this act in the General Land Office, cause the same to be examined, and if, in his judgment, the rules and regulations have been complied with he will transmit the records to the Secretary with his report and recommendation. If, however, the Commissioner finds that the selection is defective or that the rules and regulations have not been complied with, he will reject the selection or require further proofs.

24. If upon examination of an application to select under this act the Secretary decides that it should be allowed, the applicant will be required to have his relinquishment recorded in the manner prescribed by the State or Territory where the land is situated, and to have the abstract of title extended down to and including the date the deed of relinquishment or conveyance was recorded.

25. If the Secretary be of opinion that further evidence as to value and character of the land involved is necessary, he may institute such an inquiry as he may deem advisable, and may require the applicant to deposit a sum of money to defray the expense of the investigation. In any case where deposit shall be required to defray the expense of an investigation it will be made with the Secretary of the Interior, to be held and disbursed by him or under his directions.

26. If the Secretary approve the proposed exchange the Commissioner of the General Land Office will, as soon as practicable, after the receipt of the advice of such approval, make suitable notations on the records of his office and notify the local office wherein the selected land is subject to disposal thereof. The Commissioner in his letter to the local officer will require that the applicant be notified of the approval of his application, and informed that he will be allowed sixty days in which to place the deed of reconveyance or relinquishment of record and to extend the abstract of title down to and including the date of the recordation of such deed, and that he be further advised that in default of action within the time specified the application will be finally rejected without further notice.

27. Approval by the Secretary of the Interior will be subject to and conditioned upon the bona fide compliance on the part of the applicant with all the regulations and requirements herein or which may, by direction of the Secretary of the Interior, be hereafter promulgated.

THE SECRETARY'S DISCRETION.

28. The Secretary of the Interior may, in the exercise of the discretion in him vested by law, withhold his approval from any

application made under the provisions of this act, although the applicant may have complied with the rules and regulations herein prescribed. Owners of land situated within the boundaries of Indian reserves, created by Executive order, are hereby specifically informed that if, in the opinion of the Secretary, the approval of any application, made under the provisions of this act, would be inimical to the public interests, such application will be rejected.

Very respectfully,

Approved March 3, 1909.

JAMES RUDOLPH GARFIELD,
Secretary.

FRED DENNETT,
Commissioner.

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4—088.

SELECTION IN LIEU OF LAND IN — INDIAN RESERVATION.

(Act April 21, 1904.)

To the Register and Receiver,
United States Land Office,
—, —.

Gentlemen:

I am the owner of the — Meridian, containing — acres; said land is situated in the County of —, State of —, within the boundaries of the — Indian Reservation, and is located within the — land district; I desire to relinquish and reconvey said lands to the United States and in lieu thereof to select the — land district, State of —, containing — acres, under the provisions of the act of April 21, 1904 (33 Stat., 211).

In compliance with the regulations under said act I have made and executed a deed of reconveyance to the United States of the tract first above described, situated within the said — Indian Reservation, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted, and I do hereby bind myself and promise to have said deed placed of record and the abstract of title duly extended to the date of the recordation of such deed, without cost to the United States, upon receipt of notice from the land department that I am required so to do. I further agree that I will deposit with the Secretary of the Interior, upon demand, a reasonable sum of money to be by him expended in investigating the bona fides of this application.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from incumbrance of any kind; also an affidavit, duly corroborated, showing the land selected to be nontimbered and nonmineral in character, and unoccupied, and that the lands surrendered and the lands selected herein described are equal in area and value. I therefore ask, that, subject to the approval of the Secretary of the Interior, a United States patent issue to me for the tract or tracts herein selected.

— — —

Land Office at —, —,
—, 19—.

I, —, register of the Land Office, do hereby certify that the land above selected, in lieu of the land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry, or claim thereto.

Selection approved by the Secretary —, 19—.

Register.

Approved by the Commissioner —, 19—.

Approved for patent —, 19—.

4—089.

AFFIDAVIT FOR SELECTIONS.

(Under the act of April 21, 1904—33 Stat., 211.)

Indian Reservations.

(To be made by the selector, or other creditable person cognizant of the facts, before an officer authorized to administer oaths. Before being sworn, affiant should be advised of the penalties of a false oath.)

DEPARTMENT OF THE INTERIOR,
United States Land Office,

—, —,
—, 19—.

—, being duly sworn according to law, deposes and says that he is a citizen of the United States, and that his post-office address is —; that he is well acquainted with the character, condition, and value of the following-described land, and with each and every legal subdivision thereof, having personally examined the same, to wit: —; that his personal knowledge of said land enables him to testify understandingly with respect thereto; that there is not, within the limits of said land, any known vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper; that there is not, within the limits of said land, any known deposit of coal, or any known placer deposit, oil, or other valuable mineral; that said land contains no salt springs, or known deposits of salt in any form, sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that said land is essentially nonmineral in character, has upon it no mining or other improvements, and is not in any manner occupied adversely to the selector; and that the selection thereof is not made for the purpose of obtaining title to mineral land.

Affiant further says that he is well acquainted with the value of the hereinafter-described land, having frequently passed over the same, and that from personal observation and knowledge he states that the lands hereinbefore and hereinafter described are of equal value; —

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known

(or has been satisfactorily identified before me by —), and I verily believe him to be a credible person and the person he represents himself to be; and that this affidavit was subscribed and sworn to before me at my office in —, on this — day of —, 19—.

— — —
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ENLARGED HOMESTEAD—ACT OF FEBRUARY 19, 1909.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 25, 1909.

The Registers and Receivers, United States Land Offices, Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Arizona, and New Mexico.

GENTLEMEN: The following instructions are issued for your guidance in the administration of the act of Congress, approved February 19, 1909, "to provide for an enlarged homestead" (Public—No. 245), copy of which may be found at the end of these instructions:

HOMESTEAD ENTRIES FOR 320 ACRES—KIND OF LAND SUBJECT TO SUCH ENTRY.

1. The first section of the act provides for the making of homestead entry for an area of 320 acres, or less, of nonmineral, nontimbered, nonirrigable public land in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, and in the Territories of Arizona and New Mexico.

The term "nonirrigable land," as used in this act, is construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farming," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

Therefore, lands containing merchantable timber, mineral lands, and lands within a reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply, may not be entered under this act. Minor portions of a legal subdivision susceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under this act, provided, however, that no one entry shall embrace in the aggregate more than 40 acres of such irrigable lands.

DESIGNATION OR CLASSIFICATION OF LANDS—APPLICATIONS TO ENTER.

2. From time to time lists designating the lands which are subject to entry under this act will be sent you, and immediately upon receipt of such lists you will note upon the tract books opposite the tracts so designated, "Designated, act February 19, 1909." Until such lists have been received in your office, no applications to enter should be received and no entries allowed under this act, but after the receipt of such lists it will be competent for you to dispose of applications for lands embraced therein under the provisions of this act, in like manner as other applications for public lands, without first submitting them to the General Land Office for consideration.

COMPACTNESS—FEES.

3. Lands entered under this act must be in a reasonably compact form, and in no event exceed $1\frac{1}{2}$ miles in length.

The act provides that the fees shall be the same as those now required to be paid under the homestead laws; therefore, while the fees may not in any one case exceed the maximum fee of \$10, required under the general homestead law, the commissions will be determined by the area of land embraced in the entry.

FORM OF APPLICATION.

4. Applications to enter must be submitted upon affidavit, Form No. 4-003, copy of which is annexed hereto.

ADDITIONAL ENTRIES.

5. Section 3 of the act provides that any homestead entryman of lands of the character described in the first section of the act, upon which entry final proof has not been made, may enter such other lands, subject to the provisions of this act, contiguous to the former entry, which shall not, together with the lands embraced in the original entry, exceed 320 acres, and that residence upon and cultivation of the original entry shall be accepted as equivalent to residence upon and cultivation of the additional entry.

This section contemplates that lands heretofore entered may be classified or designated by the Secretary of the Interior as falling within the provisions of this act and in such cases an entryman of such lands who had not, at the date of the act, made final proof, may make such additional entry, provided he is otherwise qualified. Applicants for such additional entries must, of course, tender the proper fees and commissions and must make application and affidavit on

Form No. 4-004, attached hereto. Entry men who made final proof on the original entries prior to the date of the act are not entitled to make additional entries under this act.

FINAL PROOFS ON ORIGINAL AND ADDITIONAL ENTRIES—COMMUTATION
NOT ALLOWED.

6. Final proofs must be made as in ordinary homestead cases, and in addition to the showing required of ordinary homestead entrymen it must be shown that at least one-eighth of the area embraced in each entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry has been continuously cultivated to agricultural crops other than native grasses, beginning with the third year of the entry and continuing to date of final proof.

Final proof submitted on an additional entry must show that the area of such entry required by the act to be cultivated has been cultivated in accordance with such requirement; or that such part of the original entry as will, with the area cultivated in the additional entry, aggregate the required proportion of the combined entries, has been cultivated in the manner required by the act.

Proof must be made on the original entry within the statutory period of seven years from the date of the entry; and if it can not be shown at that time that the cultivation has been such as to satisfy the requirements of the act as to both entries it will be necessary to submit supplemental proof on the additional entry at the proper time. But proof should be made at the same time to cover both entries in all cases where the residence and cultivation are such as to meet the requirements of the act.

Commutation of either original or additional entry, made under this act, is expressly forbidden.

RIGHT OF ENTRY.

7. Homestead entries under the provisions of section 2289 of the Revised Statutes, for 160 acres or less, may be made by qualified persons within the States and Territories named upon lands subject to such entry, whether such lands have been designated under the provisions of this act or not. But those who make entry under the provisions of this act can not afterwards make homestead entry under the provisions of the general homestead law, nor can an entryman who enters under the general homestead law lands designated as falling within the provisions of this act afterwards enter any lands under this act.

A person who has, since August 30, 1890, entered and acquired title to 320 acres of land under the agricultural-land laws (which

is construed to mean the timber and stone, desert land, and homestead laws) is not entitled to make entry under this act; neither is a person who has acquired title to 160 acres under the general homestead law entitled to make another homestead entry under this act, unless he comes within the provisions of section 3 of the act providing for additional entries of contiguous lands, or unless entitled to the benefits of section 2 of the act of June 5, 1900 (31 Stat., 267), or section 2 of the act of May 22, 1902 (32 Stat., 203).

If, however, a person is a qualified entryman under the homestead laws of the United States, he may be allowed to enter 320 acres under this act, or such a less amount as when added to the lands previously entered or held by him under the agricultural land laws shall not exceed in the aggregate 480 acres.

CONSTRUCTIVE RESIDENCE PERMITTED ON CERTAIN LANDS IN UTAH:

8. The sixth section of the act under consideration provides that not exceeding 2,000,000 acres of land in the State of Utah, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of this act; with the exception, however, that entrymen of such lands will not be required to prove continuous residence thereon. The act provides in such cases that all entrymen must reside within such distance of the land entered as will enable them successfully to farm the same as required by the act; and no attempt will be made at this time to determine how far from the land an entryman will be allowed to reside, as it is believed that a proper determination of that question will depend upon the circumstances of each case.

Applications to enter under this section of the act will not be received until lists designating or classifying the lands subject to entry thereunder have been filed and noted in the local land offices. Such lists will be from time to time furnished the registers and receivers, who will immediately upon their receipt note upon the tract books opposite the tract so listed the words "Designated, section 6, act February 19, 1909." Stamps for making the notations required by these instructions will be hereafter furnished the local officers. Applications under this section must be submitted upon Form 4-003, copy of which is annexed hereto.

FINAL PROOFS ON ENTRIES ALLOWED UNDER SECTION 6—RESIDENCE— COMMUTATION NOT ALLOWED.

9. The final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show

that from the date of original entry until the time of making final proof he resided within such distance from said land as enabled him to successfully farm the same. Such proof must also show that not less than one-eighth of the entire area of the land entered was cultivated during the second year; not less than one-fourth during the third year; and not less than one-half during the fourth and fifth years after entry.

OFFICERS BEFORE WHOM APPLICATION AND PROOFS MAY BE MADE.

10. The act provides that any person applying to enter land under the provisions thereof, shall make and subscribe before the proper officer an affidavit, etc. The term "proper officer," as used herein, is held to mean any officer authorized to take affidavits or proof in homestead cases.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

Approved, March 25, 1909.

R. A. BALLINGER, *Secretary.*

[PUBLIC—No. 245.]

AN ACT To provide for an enlarged homestead.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this act, in the States of Colorado, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, and the Territories of Arizona and New Mexico, three hundred and twenty acres, or less, of non-mineral, nonirrigable, unreserved and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply.

SEC. 2. That any person applying to enter land under the provisions of this act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this act, and shall pay the fees now required to be paid under the homestead laws.

SEC. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

Sec. 4 That at the time of making final proofs as provided in section twenty-two hundred and ninety-one of the Revised Statutes the entryman under this act shall, in addition to the proofs and affidavits required under the said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

Sec. 5. That nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named in section one of this act under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this act shall be commuted.

Sec. 6. That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this act without the necessity of residence: *Provided*, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.

Approved, February 19, 1909.

4-003.

[Form approved by the Secretary of the Interior March 25, 1909.]

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

[Act February 19, 1909.]

U. S. land office, _____

No. _____

APPLICATION AND AFFIDAVIT.

I, _____ (give full Christian name) _____ (male or female), a resident of _____ (town, county, and State), do hereby apply to enter, under the act of February 19, 1909 (Public—No. 245), the _____ section _____, township _____, range _____, _____ meridian, containing _____ acres, within the _____ land district; and I do solemnly swear that I am not the proprietor of more than 160 acres of land in any State or Territory; that I, _____ (applicant must state whether native born, naturalized, or has filed declaration of intention to become a citizen. If not native born, certified copy of naturalization or declaration of intention, as case may be, must be filed with this application), _____, citizen of the United States, and am _____ (state whether the head of a family, married or unmarried, or over twenty-one years of age, and if not over twenty-one applicant must set forth the facts which constitute him the head of a family); that my post-office address is _____; that this application is honestly and in good faith made for the purpose

of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making this entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I may acquire from the Government of the United States will inure in whole or in part to the benefit of any person except myself. I have not heretofore made any entry under the homestead, timber and stone, desert land, or preemption laws except ----- (here describe former entry or entries by section, township, range, land district, and number of entry; how perfected, or if not perfected state that fact); that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any Indian; that the lands applied for do not contain merchantable timber, and no timber except ----- (here fully describe amount and kind of timber, if any), and that it is not susceptible of successful irrigation at a reasonable cost from any known source of water supply, except the following areas: ----- (give the subdivisions and areas of the lands, if any, susceptible of irrigation).

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known, or has been satisfactorily identified before me by ----- (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in ----- (town), day of -----, 19--.

----- (county and State), within the ----- land district, this -----

(Official designation of officer.)

We, -----, of -----, and -----, of -----, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affidavit was duly subscribed to before me at _____, this _____ day of _____, 19____.

(Official designation of officer.)

United States land office at _____
_____, 19__

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of February 19, 1909, and that there is no prior valid adverse right to the same; and has this day been allowed.

Register.

4—004.

[Form approved by the Secretary of the Interior, March 25, 1909.]

DEPARTMENT OF THE INTERIOR.

APPLICATION AND AFFIDAVIT.

ADDITIONAL HOMESTEAD.

* [Act of February 19, 1909.]

Application No. _____ Land office at _____

I, _____, of _____, do hereby apply to enter under section 3 of the act of February 19, 1909 (Public—No. 245), the _____ of section _____, township _____, range _____, meridian _____, containing _____ acres, as additional to my homestead entry No. _____ made _____ at _____ land office for the _____ section _____, township _____, range _____, meridian _____.

I do solemnly swear that I am not the owner of more than one hundred and sixty acres in any State or Territory, exclusive of the land included in my original entry above described, and that this application is made for my exclusive benefit as an addition to my original homestead entry, and not directly or indirectly for the use or benefit of any other person or persons whomsoever; that this application is honestly and in good faith made for the purpose of actual settlement and cultivation; that I will faithfully and honestly endeavor to comply with all the requirements of law; and that I have not heretofore made an entry under the homestead, timber and stone, desert land, or preemption laws other than that above described, except _____ (here describe former entries, if any); that I am well acquainted with the character of the land herein applied for and each and every legal subdivision thereof, having passed over the same; that my personal knowledge of the land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal, cement, gravel, or other valuable mineral deposit; that the land contains

no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of the land is worked for minerals during any part of the year by any person or persons, and that my application is not made for the purpose of fraudulently obtaining title to mineral lands; that the land is not occupied and improved by any Indian, and is unoccupied and unappropriated by any person claiming the same under the public land laws other than myself; that the land embraced in the original entry and the land now applied for do not contain merchantable timber, and no timber except _____ (here fully describe amount and kind of timber, if any), and that it is not susceptible of successful irrigation at a reasonable cost from any known source of water supply, except the following areas: _____ (Give the subdivisions and areas of the lands, if any, susceptible of irrigation.)

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 5392, R. S.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by _____ [give full name and post-office address]); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in _____ (town), _____ (county and State), within the _____ land district, this _____ day of _____, 19____

(Official designation of officer.)

We, _____, of _____, and _____, of _____, do solemnly swear that we are well acquainted with the above-named affiant and the lands described, and personally know that the statements made by him relative to the character of the said lands are true.

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by _____); and that said affidavit was duly subscribed to before me at _____, this _____ day of _____, 19____.

(Official designation of officer.)

United States Land Office at _____,
_____, 19____

I hereby certify that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under the act of February 19, 1909, and that there is no prior valid adverse right to the same; and has this day been allowed.

Register.

RAILROAD GRANT—RIGHT OF WAY—FORFEITURE.

COPPER RIVER AND NORTHWESTERN RY. CO. ET AL. *v.* ALASKA PACIFIC RAILWAY AND TERMINAL CO.

Under the terms of the act of May 14, 1898, as amended by the act of March 11, 1908, the failure of the Alaska Pacific Railway and Terminal Company to complete the first twenty-mile section of its road within one year after the definite location of said section and to file a map showing the definite location of an additional twenty-mile section within the time fixed therefor, constitute a forfeiture of the rights granted to the company by said acts, without further action or declaration, and the reservations of lands for the purposes of such rights of way have therefore ceased and become null and void.

The filing of a map showing the definite location of several disconnected fragments of road, amounting to twenty miles in all, none of which is coterminous with the portion of the road theretofore definitely located, is not a compliance with the provisions of the act of May 14, 1898, requiring the filing of maps showing definite location in twenty-mile sections.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 5, 1909.* (G. B. G.)

These are the respective appeals of the Copper River and Northwestern Railway Company and the Copper River Railway Company from your office decision of April 14, 1908, refusing, on the present showing, to submit for approval the first-named company's map of definite location as to a line of road from a point near the mouth of the Chitina river, thence crossing the Copper river and following down the west bank of said stream to a point near the mouth of the Urintina river, a distance of twenty miles, in the Juneau land district, Alaska, and holding as to the second-named company that all rights acquired by it by the filing of its map of preliminary survey have been forfeited as to such line because of its failure to file a map in the year ending January 15, 1908, showing the definite location of at least a twenty-mile section of its line of road.

The refusal of your office to submit for approval the said map of the Copper River and Northwestern Railway Company is put upon the ground that a third company, to-wit, the Alaska Pacific Railway and Terminal Company, has certain claimed rights, acquired by the survey and preliminary location of the same twenty-mile section, which might not be determined until after March 18, 1909, which was the time fixed by an act of Congress of March 11, 1908 (35 Stat., 41), within which the last-named company was permitted to file the maps of definite location required of it by the act of May 14, 1898 (30 Stat., 409), entitled, "An act extending the homestead laws and providing for rights of way for railroads in the District of Alaska, and for other purposes."

The issues involved in this case require a study of certain provisions of these two acts.

The act of May 14, 1898, *supra*, provides:

Sec. 2. That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road. . . .

Sec. 5. That any company desiring to secure the benefits of this act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles, as definitely fixed, and shall thereafter each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within one year after the definite location of said section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action.

Sec. 8. . . . In all conflicts relative to the right of way or other privilege of this act the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right.

Sections one and two of the act of March 11, 1908, *supra*, are as follows:

First. The time to file the map and profile of definite location of its second section of at least twenty miles with the register of the land office in the district of Alaska, as provided in said sections four and five, is hereby extended to and including the eighteenth day of March, nineteen hundred and nine.

Second. The time to complete the first section of at least twenty miles of its railroad, as provided in said section five, is hereby extended to and including the eighteenth day of March, nineteen hundred and nine, and such railroad company shall be entitled to all the benefits conferred upon it by the provisions of such act upon its due compliance with all the provisions thereof, excepting only the provisions thereof relating to the filing of the map and profile of definite location of its second section of not less than

twenty miles of its road: *Provided*, That it shall have, successively, one year each after said eighteenth day of March, nineteen hundred and nine, in which to file the map and profile of its definite location of the succeeding sections of not less than twenty miles each: *And provided further*, That it shall have five years in which to complete its entire line.

To avoid confusion on account of similarity of names, the Copper River and Northwestern Railway Company will be hereinafter designated as the Northwestern company, the Copper River Railway Company as the Copper River company, and the Alaska Pacific Railway and Terminal Company as the Alaska Pacific company. The pertinent facts, gathered from the record and from informal inquiry at your office, stated in sequence with reference to each company, are as follows:

May 8, 1905, the Alaska Pacific company filed its articles of incorporation and proofs of organization with the secretary of the State of Washington, which authorized this company, among other things:

To lay out, construct, furnish and equip a railroad line and rail-road from a point on the northern part of Martins Island in the District of Alaska, by some practicable and convenient route, in a northerly direction from the Pacific Ocean, or some bay or inlet thereof; and also to extend, lay out, construct, furnish and equip said railroad line and railroad from such point at or near the northerly point of Martins Island to such other point and points on the waters of the Pacific Ocean and the branches and inlets thereof, as may be hereafter determined upon by said corporation, and also to lay out, construct, furnish and equip such branch railroads and railroad lines connecting said main railroad line with other points on Martins Island and other points in the interior of the District of Alaska, as may hereafter be determined upon by said corporation.

January 23, 1906, this company filed a copy of articles of incorporation and proofs of organization at Juneau, Alaska, but on February 13, 1906, your office required that the articles be amended so as to describe the line of the proposed railroad. February 26, 1906, a copy of such amended articles was transmitted to your office, and after certain corrections as to proofs of organization, the papers were accepted for filing by the Department on April 6, 1906.

May 19, 1905, the Northwestern company filed its articles of incorporation and proofs of organization with the secretary of the State of Nevada, which were transmitted to your office, where, on June 13, 1905, proofs of organization were required, which were later furnished, and the papers relating to the incorporation of the company were accepted by the Department July 18, 1905. May 26, 1906, this company filed direct in your office its map of preliminary survey showing the location of that section of the company's line of road in controversy, which was accepted for filing by your office July 20, 1906, and on December 18, 1906, the map of definite location of said line was filed in your office.

January 13, 1906, the Copper River company filed its articles of incorporation and proofs of organization with the secretary of the State of Washington. Copies of these articles and proofs were transmitted to your office January 15, 1906, and after some minor corrections in the proofs of organization, were accepted by the Department March 14, 1906. In the meantime, however, on February 19, 1906, this company had filed in the Juneau land office a map showing the preliminary location of its line of road along the section here in controversy, which was accepted for filing by your office April 11, 1906. No map showing the definite location of this section of the company's line of road has been filed, but on January 15, 1907, said company filed in your office a map showing the definite location of 82.43 miles of road, shown on its said map of preliminary survey, and this map of definite location was approved, in part, by the Secretary of the Interior, October 29, 1907. Since that time, so far as appears from the records, no map of definite location of any part of its line of road shown on the map of preliminary survey has been filed.

Many vexatious questions are raised by this record, it being urged, among other things:

(1) That while admitting that the preliminary survey made by the Alaska Pacific company was prior in time to that made by either of the other companies, the Alaska Pacific company took nothing by such survey, because its articles of incorporation at that time did not authorize it to build the line covered by its survey (citing *Washington & Idaho R. R. Co. v. Coeur d'Alene Ry. and Nav. Co.*, 160 U. S., 77).

(2) That although the Alaska Pacific company's amended articles of incorporation authorizing the construction of such line and map of preliminary survey were filed in advance of the filing of such map by the Northwestern company, whatever rights may have been secured thereby as against the United States could not be held to defeat rights acquired by the other companies by their preliminary surveys duly followed by the filing of maps thereof.

(3) That in any event your office erred in holding that the Copper River company has forfeited its admittedly prior superior right to such line because of its failure to file a map of definite location of a second section of its road during the year ending January 15, 1908, it being urged that the map filed January 15, 1907, showing the definite location of 82.43 miles of its road, meets all the requirements of the statute for the year ending January 15, 1909.

(4) That the Alaska Pacific company having failed within the time allowed by the act of May 14, 1898, as extended by the act of

March 11, 1908, to definitely locate a second section of its line of road, or to construct the first section, whatever rights it may have had in this field are forfeited.

It appearing that the Northwestern company and the Copper River company are represented on these appeals by the same firms of attorneys, said attorneys were asked to explain this circumstance and have informally advised the Department that there is no conflict of interest between these two companies, and on April 1, 1909, filed a certified copy of a resolution of the Board of Directors of the Copper River company, in effect that it consents to the approval of the Northwestern company's said map of definite location subject to all intervening adverse rights.

If the fourth contention as stated is true in fact and sound in law, none other need be considered.

The Alaska Pacific company does not appear to be represented by counsel upon the appeals and there is no evidence in this record that it had prior to March 18, 1909, or at all, filed the map and profile of a second section of at least twenty miles or completed the first section of at least twenty miles of its road. Thus, as the first section was "not completed within one year after the definite location of said section," and the map of definite location of an additional twenty-mile section was not filed during the year ending March 18, 1909, by the terms of the act of May 14, 1898, as amended by the act of March 11, 1908, the rights granted to this company are "forfeited" and therefore "revert to the United States without further action or declaration," and the reservations of the lands involved for the purposes of such right of way are null and void.

In reaching this conclusion the fact has not been overlooked that on July 6, 1908, the Alaska Pacific company appears to have filed maps of definite location of three separate fragments of proposed road, amounting to twenty miles in all, none of which is coterminous with its definitely located section. This is not a compliance with the provisions of the statute as to the definite location of a second section of at least twenty miles. While it may be that the statute does not require locations coterminous with the section first located, it is quite clear that fragmentary locations of parts of a section do not meet these requirements.

If the map of definite location filed by the Copper River and Northwestern company is in all respects regular, your office will forward the same for approval. Your office will advise each of the companies of this direction.

SECOND CONTESTANT—COLLUSION—PREFERENCE RIGHT.

JAMES *v.* STANLEY.

Where a second contest is filed charging collusion in a prior contest, notice thereof should be issued and served upon the entryman and the prior contestant and the second contestant permitted to participate in the hearing upon the first contest by introducing evidence to support the charges made by him.

Should the entry in such case be relinquished prior to hearing on the first contest, notice of the cancellation of the entry should be given both contestants, and in event both apply to enter within the preferred right period, the junior contestant should be given opportunity to prove the charge of collusion and thereby defeat the preference right of the first contestant.

Where the affidavit of a junior contestant charging collusion is not filed until after hearing upon the prior contest, and the entry is canceled as a result of the first contest, the junior contest will wholly fail; but the junior contestant is not thereby precluded from attacking the application of the successful contestant to enter the land, upon the ground of collusion or any other valid cause, should the latter attempt to exercise a preferred right of entry.

Gotebo Townsite *v.* Jones, 35 L. D., 18, modified.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 5, 1909.* (S. W. W.)

December 30, 1901, Mary E. Bradley made desert-land entry, No. 839, of the W. $\frac{1}{2}$, Sec. 3, T. 13 S., R. 25 E., Roswell land district, New Mexico, and on March 18, 1904, assigned the same to Ellen G. Hamilton, who, in turn, on August 8, 1904, assigned to James E. Caldwell, who also assigned on March 27, 1905, to Wyatt Stanley.

October 5, 1905, John R. Stanley filed an affidavit of contest against said entry alleging that neither the original entryman nor any of the assignees had expended for the purposes required by the statute the amount of \$1.00 per acre for the year ending December, 1904. Notice seems to have been issued upon this affidavit December 7, 1905, but no hearing was ever had.

It further appears that on November 28, 1905, subsequent to the filing of the contest by John R. Stanley, George M. James filed an affidavit of contest against the entry alleging that neither "Mary E. Bradley, nor any of her assigns, has expended the sum of \$1.00 per acre per annum in and during the last two years, as required by law, in the necessary irrigation, reclamation, and cultivation of said tract and in permanent improvements upon the same, nor in the purchase of water rights for the irrigation of the same."

January 15, 1906, James filed an amended affidavit against said entry alleging, in addition to the charges made in his first affidavit, that although four years had elapsed since said entry was made there was no water upon the land, with which it could be irrigated, and

that "the contest of John R. Stanley against said entry is collusive and not made in good faith but to enable the said Wyatt Stanley, his father, to hold the same."

Both of the affidavits filed by James were received by the local officers and filed subject to the determination of the prior contest initiated by John R. Stanley; and it seems that both the papers were lost but were afterwards, by permission of your office, reproduced and placed on file October 30, 1907.

In the meantime, however, by your office telegram of December 14, 1905, the local officers were directed to suspend all desert-land entries and all lands covered thereby in townships 13, 14, and 15 south, range 25 east, pending further instructions.

February 21, 1906, John R. Stanley, who had on October 5, 1905, filed a contest affidavit against the entry, filed in the local land office the relinquishment of Wyatt Stanley, and on the same day filed his waiver of preference right to enter the lands, and Grace G. Stanley, wife of the aforesaid John R. Stanley, thereupon offered her application to make desert-land entry of the same land.

The local officers, in their report of March 6, 1906, upon said matter, stated as follows:

Said relinquishment was refused by the register for the reason that said D. L. E. No. 839, and the land embraced therein were under suspension, and the application of Grace G. Stanley was refused, the land applied for being embraced in D. L. E. No. 839, which remains intact on the records of this office.

Grace G. Stanley appealed to your office from the action of the register and receiver, and by office decision "P" of July 9, 1906, it was held that the filing of the relinquishment operated *eo instanti* to release the land from the entry No. 839, and that said entry should have been canceled on the records of the local office at the time the relinquishment was filed, and the local office was instructed to cancel the said entry as of date February 21, 1906. Your said decision of July 9 further directed the local office to hold without action, pending the disposition of proceedings by which the lands and entries involved had been suspended, the application of Grace G. Stanley, and to file it simply as of the date upon which it was offered; and, further, that when said order of suspension of December 14, 1905, should be revoked, James should be notified that he would be afforded an opportunity to prove the charges of collusion contained in his amended contest affidavit, notice also to be given at the same time to Grace G. Stanley of the time and place of such hearing, in order that she might be permitted to participate therein for the purpose of denying, if she saw fit to do so, the charges made by contestant, and in support of any interest or claim she might assert in connection

with her application tendered February 21, 1906. Your said decision concluded with the statement that if upon such hearing it should be shown that the contest of John R. Stanley was collusive and fraudulent and that James was entitled to the preference right of entry, the application of Grace G. Stanley should be rejected and the lands held open to entry subject to the preference right of James, as contestant.

Because of the delay occasioned by the loss of the affidavit of contest which had been filed by James, as above stated, no further action seems to have been taken until December 7, 1907, when the local officers reported that in view of the departmental decision of July 14, 1906, in the case of Gotebo Townsite *v. Jones* (35 L. D., 18), it was their opinion that the application of Grace G. Stanley should be allowed and entered of record and the contest of James dismissed, in view of which opinion, and because of the previous instructions issued by your office, additional instructions were requested by the register and receiver.

By your office decision "H" of April 23, 1908, it was held that James acquired no preference right of entry by reason of his contest, although he may have defeated the preference right of John R. Stanley, because James was a second contestant, and that by the act of May 14, 1880 (21 Stat., 140), the preference right is bestowed only upon the contestant who pays the costs and fees and procures the cancellation of the entry contested, citing the case of *White v. Linnemann* (23 L. D., 378). Your said decision also cited the case of *Gotebo Townsite v. Jones*, *supra*, and held that, in view of said decisions, it was unnecessary to remand the case for further hearing. Accordingly, the contest of James was dismissed, and his appeal brings the case before the Department.

The Department has carefully considered the questions involved in this matter and is of opinion that your decision of April 23, 1908, does not make a proper disposition of the case. Your said decision finds no support in the decision of *White v. Linnemann*, above, for the reason that no charge of collusion was made against the first contest by the junior contestant in that case, and while the decision in the case of *Gotebo Townsite v. Jones*, *supra*, does support the conclusion reached by you in this case, it should be observed that in the case of the Townsite of Gotebo there was an additional reason for refusing to allow the second contestant to exercise a preference right of entry, namely, at the time he endeavored to make entry the land was unquestionably occupied for townsite purposes.

If, as charged by James, the contest of John R. Stanley was collusive, it can not be said, in any view of the case, that the relinquishment of the entry was the result of such contest. If, however, the charge contained in James's affidavit of contest was true, it neces-

sarily follows that it was his contest, rather than that of Stanley, that procured the cancellation of the entry.

The Department is therefore of the opinion that James should be allowed an opportunity of proving the truth of the allegations contained in his affidavit of contest, namely, that the prior contest of John R. Stanley was collusive and initiated in fraud and not for the purpose of securing the cancellation of an illegal entry but rather in the interest of the record entryman and for the purpose of longer withholding the land from lawful entry until disposition could be made of such entryman's relinquishment.

In order that there may be some well-established rule governing proceedings in matters of this sort, it is deemed advisable that your office, in preparing the regulations required by departmental decision of March 20, 1909, in the case of *Crook v. Carroll*, should also provide for cases of this character.

Where a second contest is filed charging collusion in prior contest, it is believed that good administration requires that notice of such second contest should be issued and served both upon the entryman and the prior contestant, and that the second contestant should be permitted to participate in the hearing, when had, upon the first contest by introducing such evidence as he may see fit in support of the charges made by him. If however, before the case proceeds to a hearing the entry is relinquished, notice of the cancellation of the entry should be given both contestants, and in the event they both apply to enter within the period of preferred right, the junior contestant charging collusion should be given an opportunity to prove that charge and thus defeat the claimed preference right of the first contestant.

But where a junior contestant charging collusion does not file his affidavit until after the prior contest has proceeded to a hearing, it will, of course, be impossible for him to participate in the hearing, and in such case, if the entry should be canceled as a result of the prior contest, the junior contest must wholly fail. This, however, is not intended to preclude the person filing such junior contest from attacking the application of the successful contestant to make entry, upon the ground of collusion, or for any other valid cause, should the latter attempt to exercise a preferred right of entry, but merely means that a junior contestant who does not file his contest until after a hearing has been had on a prior contest which resulted in the cancellation of the entry, can gain no rights thereby, notwithstanding that he may charge collusion in the first contest.

The Department is aware that this rule is arbitrary but there must be some end to the number of proceedings which may be allowed, or lands may be tied up in litigation indefinitely, and the rule laid down

above will protect the diligent and is therefore believed to be sufficiently liberal.

It is appreciated that the opinion expressed herein does not fully accord with the views of the Department in the case of Gotebo Town-site *v. Jones*, *supra*, where the second contestant, charging collusion, appeared at the hearing and actually proved his charges, and where the Department held he gained no preferred right by reason of such facts. However, as stated above, the decision of the Department in that case was based also upon other grounds, and your office will not be longer controlled by the decision in that case, so far as in conflict with the directions given herein.

Your decision is accordingly reversed.

CONFIRMATION—TIMBER AND STONE ENTRIES—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

MENASHA WOODEN WARE COMPANY, ASSIGNEE OF WILLIAM GRIBBLE.

Timber and stone entries are not within the intent and operation of the proviso to section 7 of the act of March 3, 1891.

Opinion of the Court of Appeals of the District of Columbia,
April 6, 1909.

The relators filed a petition for a writ of mandamus, to compel James R. Garfield, then Secretary of the Interior, to issue a patent for one hundred and sixty acres of land, in the State of Idaho, claimed by virtue of an entry under the act of June 3, 1878 (20 Stat., 89), commonly called the "Timber and Stone Act."

The petition alleged that William Gribble, who has since conveyed his interest to his co-relator, made an application for entry of the land, in strict compliance with all of the provisions of the law authorizing the same; that said land having been surveyed and entry approved, said Gribble paid to the proper officer of the land department in Coeur d'Alene district, Idaho, the required purchase price, namely, \$300, and on June 10, 1901, received from him the required certificate; that the proof and all of the papers relating to said entry and payment were duly transmitted to the Commissioner of the General Land Office; that no contest of or protest against said entry were filed within two years thereafter; and that it became the duty of the Secretary of the Interior to issue patent thereon, as required by the law.

The return of the Secretary to the rule to show cause admits entry and payment as aforesaid, and the receipt of the papers in the Land Office, but alleges that the application has not been finally acted upon by the Department. It further alleges that on July 20, 1901, the local land officers were directed to cross-examine all applicants and

their witnesses in timber and stone entries, before issuing any receipts on the proof offered. That on November 20, 1901, a list of twelve such entries was sent to the local agents for investigation, but Gribble's entry was not included therein. On November 5, 1902, a further list was sent for the same purpose, which included Gribble's entry. A letter to the agent stated that there were no charges against such entries, but as the testifying witnesses are the same in several instances, there is a suspicion of fraud about them which requires investigation. The agent was instructed that if he found there was not sufficient evidence on which to base a charge of fraud, that could be sustained, he should write a separate letter in each case and recommend that the entry be relieved from suspension. On May 29, 1903, a further notice was sent to said agent that the entry of Gribble and certain others would not go to patent until claimant's witnesses had been cross-examined, and he was directed to proceed with such examination and make a separate report in each case. That on November 2, 1903, a special report was made on the entry of Gribble. (This report is not given in the answer, and is referred to as attached to the same, but it is not copied in the record.) That the action taken on November 5, 1902, was a suspension of said entry, which was continued in force on May 29, 1903. The answer concludes thus:

Respondent further advises the court that since the investigation ordered and the report of the special agent upon this entry, the officers of the land department have been unable to locate the relator William Gribble, to make service upon him of the charges to be preferred against said entry, to the end that the opportunity might be afforded him to develop the exact state of facts respecting his purchase and alleged sale of this land to relator the Menasha Wooden Ware Company.

The relators demurred to this return. This was overruled, and electing to stand on their demurrer, the petition was dismissed.

The appellee Garfield having retired from the office of Secretary of the Interior, the present Secretary, Richard A. Ballinger, has been made a party in his stead, and the docket entry has been changed to conform thereto.

It is admitted, as we have seen, that the entry of the relator Gribble was made in due compliance with the statute, and that no formal contest or protest against the validity of the entry has been filed by any person, unless the action of the Secretary in suspending action until an investigation can be made is equivalent thereto. The right to the patent is founded on the proviso of section 7 of an act to repeal timber-culture laws, and for other purposes, approved March 3, 1891 (26 Stat., 1097), which reads as follows:

That after two years from the date of the issuance of the receiver's receipt, upon a final entry of any tract of land under the homestead, timber culture, desert land, or preemption laws, or under this act, and when there shall be no

pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him.

The contention on behalf of the relators is that there had been no contest or protest against the validity of the entry, within the contemplation of this proviso; that the right to patent thereon became absolute upon the expiration of two years after the certificate was issued; and that thereafter it became the plain, ministerial duty of the Secretary to issue the same upon demand.

It is first necessary to determine whether entries under the timber and stone act are covered by the proviso. This depends upon the significance of the word "preemption" as used therein. In its generic sense, preemption may include not only this entry, but those also made under the homestead, timber culture, desert land and other laws providing for the disposition of public lands, where the right to purchase under certain conditions in preference to others is conferred. By entry in compliance with the law governing the same, the land is in each case preempted.

In a specific sense, and by common usage, preemption laws meant the early laws relating to the disposition of the public lands, enacted years before the timber culture, desert land and timber and stone acts. If the word was intended to be used in the generic sense in the proviso, there was no occasion whatever for preceding it with the particular recital of entries under the homestead, timber culture and desert land laws. As entries under those laws constituted preemptions in the broad sense of the word, their recital would be of no effect unless the word be given its limited signification. And as all the words of a statute are to be given effect, if reasonable, in its construction, the special recital would seem to indicate that Congress intended that preemption should have this restricted meaning. Under the laws recited, either actual settlement and residence, or the actual expenditure of labor and money in improvements upon the lands so preempted, is required. In all such cases, inspection could be made at any time, and would necessarily show whether the law had been complied with. Under a timber and stone entry, on the other hand, the purchaser is not required to occupy the land, or to improve the same. He is required to do nothing beyond making the entry and paying the purchase money. Frauds perpetrated in such entries would necessarily be more difficult to detect than in the others. This would reasonably account for an intention to limit the scope of the proviso to the technical preemptions, and those of the other classes specifically named.

This construction is confirmed by the language of section 4 of the act of March 3, 1891 (26 Stat., 1097). That section repeals Chapter 4 of Title 32, Revised Statutes, which relates to preemptions (ex-

cepting several sections of the same), and "all other laws allowing preemptions of the public lands of the United States."

Giving the word as herein used the broad signification claimed for it in section 7, for which there is, at least, as strong a reason, there would be an express repeal of the timber and stone law, under which relator's entry was long thereafter made.

The repealing clause excepted all such *bona fide* preemption entries as may have been initiated before its date, and provided for their perfection. It was to such entries, as well as those under the laws mentioned, that the proviso of section 7 was intended to apply. As the proviso does not extend to the entry under consideration, the Secretary is under no duty to issue the patent which the Court can enforce.

It is unimportant to consider any other question that has been argued.

The judgment must be affirmed, with costs.

Affirmed.

SETH SHEPARD, *Chief Justice.*

SALA v. BIDOGGIA.

Motion for review and rehearing of departmental decision of September 7, 1908, 37 L. D., 141, denied by First Assistant Secretary Pierce, April 6, 1909.

DESERT-LAND ENTRY—ASSIGNMENT—CORPORATION.

EDMOND A. FOGARTY.

A corporation composed of individuals all of whom have exhausted their rights under the desert-land law, is disqualified to take the assignment of a desert land entry.

First Assistant Secretary Pierce to the Commissioner of the General (O. L.) Land Office, April 7, 1909. (J. R. W.)

Edmond A. Fogarty appealed from your decision of February 4, 1908, refusing to recognize assignment to him by the Fogarty Stock Company of the desert-land entry No. 5620, Helena series, made by Mathew M. Adams for lots 1 and 2, Sec. 4, T. 28 N., R. 22 E., surveyed, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 32, and lot 4, Sec. 33, T. 29 N., R. 22 E., unsurveyed, about 174 acres, Glasgow, Montana.

May 1, 1900, Adams made entry, and June 11, 1900, assigned it by quitclaim deed to the Fogarty Stock Company. June 10, 1904, Edmond Fogarty, president of that company, submitted final proof, but part of the land being unsurveyed final payment was not made,

nor final certificate issued. January 2, 1907, the land being then surveyed, it was adjusted to the surveys, payment was made, and final certificate 1570 issued by the Great Falls office to the "Fogarty Stock Company, assignee of Mathew Adams." May 28, 1907, before considering or acting on the final proof, you required the Fogarty Stock Company within sixty days to file affidavit showing who are its members or stockholders, and the affidavit of each member showing to what extent each one had exhausted his right to acquire title to desert land. It took no appeal, but August 8, 1907, attempted to convey the land to Edmond A. Fogarty, who submitted affidavit of his qualification and claiming recognition as assignee of the entry. February 4, 1908, you held that final certificate having issued, the entry was not subject to assignment, denied Edmond A. Fogarty's application, and required the company within sixty days to comply with the order of May 28, 1907.

The question presented is, whether the Fogarty Stock Company was or is qualified to take assignment from Adams. If the stock company could not take, Edmond A. Fogarty could get nothing by its assignment, so that it is immaterial whether an assignment after final certificate can be recognized or not. Section 7, act of March 3, 1891 (26 Stat., 1097), provides that:

No person or association of persons shall hold by assignment or otherwise, prior to issuance of patent, more than three hundred and twenty acres of such arid or desert lands.

These words are too clear to permit taking them from the statute by construction. The Department first considered them in Jacob Switzer Company (33 L. D., 383), and subsequently in Silsbee Town Company (34 L. D., 430), and J. H. McKnight Company (ib., 443). Prior to this act, October 1, 1888 (7 L. D., 337), the Department held a person is permitted to make but one entry of desert land, and that it is a clear violation of law for an individual or corporation to secure more than one entry by indirection or subterfuge. It necessarily follows that it is a violation of law for one person by indirection to obtain more than the area limited by statute. May 27, 1907, Montana Implement Company (35 L. D., 576) was decided solely on the proviso of section 7 of the act of March 3, 1891, *supra*, limiting the time for institution of proceedings after date of final certificate, and did not present this question. In no other case, so far as appellant's brief discloses, or as search has disclosed, has the Department construed the provision otherwise than as in Jacob Switzer, *supra*, and cases following it. The act was in force nearly ten years before Adams's entry, and no change has been made in departmental construction of the act.

Examination of the General Land Office records shows that Annie A. Fogarty, November 20, 1895, made desert-land entry 2276 for

N. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 34, W. $\frac{1}{2}$ W. $\frac{1}{2}$ Sec. 35, T. 29 N., R. 21 E., M. M., 320 acres, for which patent issued to her February 29, 1896. Alice D. Fogarty, October 11, 1896, made desert land entry 2284 for N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, T. 29 N., R. 21 E., 160 acres, on which no final certificate has issued.

Edmond Fogarty, April 28, 1897, made desert land entry for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 31, and SW. $\frac{1}{4}$, Sec. 32, T. 29 N., R. 22 E., 240 acres, on which final certificate issued January 9, 1907, showing as to these three parties exercise of all their rights of entry and an appropriation of 720 acres.

These three parties, having thus exercised their rights, associated, they three alone, joining no others, in executing articles of incorporation as the Fogarty Stock Company, with an authorized capital stock of \$30,000, to which they each subscribed one dollar, and made themselves the board of directors. No other stock seems to have been subscribed. May 1, 1900, Adams made his entry and forty days afterward assigned it to this \$30,000 capital stock corporation, with three dollars paid into its treasury.

Corporations are persons only by fiction of law for convenient administration of justice. Lord Mansfield held in *Morris v. Pugh* (3 Burr, 1243) that:

Fictions of law hold only in respect to the ends and purposes for which they were invented. When they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth.

The fiction in this case of a three dollar "corporation," organized to conceal three disqualified persons, is a screen so tenuous and diaphanous that it can not conceal the real persons hiding behind it from recognition of any person not totally blind. *United States v. Trinidad Coal Company* (137 U. S., 160, 169).

Your decision is affirmed.

NORTHERN PACIFIC GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

HAWTHORNE v. NORTHERN PACIFIC RY. CO. ET AL.

One who prior to January 1, 1898, settled upon unsurveyed lands within the limits of the grant to the Northern Pacific Railway Company and within ninety days after the filing of the township plat had his claim placed of record in the local office and declared his election to retain the land, is entitled to have his claim adjusted under the provisions of the act of July 1, 1898.

The Northern Pacific Railway Company can not by sale or contract to sell lands within the limits of its grant after definite location and subsequent to the passage of the act of July 1, 1898, defeat the right of an adverse claimant to have his claim adjusted under the provisions of that act.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, April 7, 1909. (S. W. W.)*

The land involved herein, namely, lot 2, Sec. 7, T. 60 N., R. 1 E., Coeur d'Alene, Idaho, land district, is within the primary limits of the grant made to the Northern Pacific Railway Company, and is opposite that portion of the road definitely located December 12, 1882. The plat of the township in which this land is situated was filed in the local land office May 6, 1903, and on the same day the company listed the tract in list No. 117, and on that date, also, Adam Hawthorne filed in the local land office his election, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), to retain said land, alleging that he resided on adjoining land in Sec. 12, T. 60 N., R. 1 W., and had cultivated the land on said lot 2, R. 1 E., continuously since the initiation of his claim by settlement in 1892.

The election of Hawthorne to retain the land was not forwarded to your office until October 5, 1903, and in the meantime, on July 27, 1903, Louis Popp filed his election to retain the lots 1 and 2 of said section 7, under the act of 1898, *supra*, alleging continuous residence on the land since August 12, 1891, his improvements thereon being valued at about \$3,000. Upon the receipt of Popp's election, said lots 1 and 2 of section 7 were included in list No. 9 of lands to be relinquished by the railway company, and said list was approved by the Department September 29, 1903, subject to adjustment under the said act of 1898. However, when the railway company was requested by your office to relinquish the said land, it submitted a showing to the effect that with the exception of a right of way for the St. Paul, Minneapolis & Manitoba Railway Company, said lots were on August 5, 1903, sold by the company to Louis Popp for the agreed price of \$447, and that he had paid \$74 on the contract.

Subsequently, Pop submitted, in response to a call from your office, an affidavit admitting that he had purchased the lots from the company, and he therefore withdrew his claim thereto under the public land laws, relying on his purchase from the company. Accordingly, your office, on January 27, 1904, dismissed his claim and closed the case.

It further appears that Hawthorne, on June 3, 1901, made homestead entry No. 2644 for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 12, T. 60 N., R. 1 W., said tracts being contiguous to the lot 2 involved herein, and that on July 7, 1903, Louis Popp made homestead entry No. 3701 for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lot 7, Sec. 6, T. 60 N., R. 1 E., upon which final certificate, No. 1027, was issued September 9, 1903, and patent issued August 26, 1904.

Your office considering Hawthorne's claim to lot 2, by decision of December 30, 1903, held that as the company had sold the lot in

question to Popp, whose alleged settlement antedated the claim of Hawthorne, the latter's claim was not subject to adjustment under the act of 1898, and Hawthorne's election to retain the land was accordingly rejected. Hawthorne filed a motion for review of that decision, and by your office letter of July 2, 1904, it was stated that action in the matter would be suspended until the Supreme Court should decide the case of *Humbird v. Avery* then pending before it, which case involved the construction of the said act of July 1, 1898, and particularly the question as to the effect of a sale made by the company subsequent to the date of the act.

The Supreme Court having decided the case of *Humbird v. Avery* (195 U. S., 480), your office on February 7, 1905, held that under the decision of the court, the sale to Popp having been made subsequent to the passage of the act of 1898, the case was not removed from the operation of the statute by said sale, and it was further held that under the circumstances of the case, inasmuch as your office refused to recognize any right in Popp by virtue of his purchase, he would be permitted, if he so desired, to renew his claim under the homestead law as to lot 2, and that should he do so a hearing would be ordered to determine the relative rights of said Popp and Hawthorne to the land in question. A motion for the review of that decision was filed by the company, which was denied by your office April 11, 1905; and no appeal having been taken, your office, on March 5, 1906, declared the decision final and ordered a hearing, in accordance with which a hearing was had, and from the evidence submitted the local land office rendered a decision in favor of Hawthorne; Popp filed no appeal, and by your office decision of March 17, 1908, the finding of the local land office was declared final, and on the same day the company was requested to relinquish said lot 2 in accordance with the provisions of the act of July 1, 1898, aforesaid.

In response to that request, Messrs. Britton & Gray, attorneys for the Northern Pacific Railway Company, replied that Popp refused to convey the land to the company except upon payment of a large bonus, and that as the company did not deem it feasible to pay its purchaser more than the original price paid by him, a relinquishment did not seem possible. It was further submitted in behalf of the company that at the date of definite location the land was free from adverse claim, and therefore inured to the company; that neither Popp nor Hawthorne had any controversy with the company prior to the passage of the act of July 1, 1898, *supra*, and that their only claim to consideration consisted in their alleged settlement upon unsurveyed land, and that as to such claim the act left it optional with the company whether relinquishment should be made or not, and in view of the company's inability to secure a reconveyance from Popp

it was not able to make the desired relinquishment, and therefore requested that the said lots 1 and 2 be eliminated from the list No. 9 of relinquishments.

Upon receipt of this showing made by the company, your office, on July 18, 1908, informed Messrs. Britton & Gray that with respect to lot 1, Popp having withdrawn claim thereto, the same had been dismissed on January 27, 1904, and the case closed, and that he had been permitted only to renew his homestead claim as to lot 2. In answer to the company's contention, however, that under the act of 1898, it was optional with the company whether it would or would not relinquish the land, your office held that such contention was without force, as the provision respecting settlement on unsurveyed lands had reference solely to settlements initiated after January 1, 1898; that lot 2 was a part of Hawthorne's original settlement claim which was initiated in 1892; that the case was accordingly subject to adjustment under the provisions of the act of 1898, and that unless the company should within sixty days relinquish the said lot, Hawthorne would be permitted to make and perfect entry thereto under the homestead laws.

The company's appeal from your action as aforesaid brings the case before the Department. This appeal having been served upon Hawthorne, his attorney on August 24, 1908, filed with the local land office a motion to dismiss the same for the reason that such appeal was taken from your office letter of July 18, 1908, when the records show that the case was closed by your office decision of March 17, 1908, and that the time for appeal allowed by the rules of practice had expired prior to the filing of the appeal on behalf of the Northern Pacific Railway Company.

In view of the disposition to be made of this case, action upon the motion to dismiss is deemed unnecessary.

The appeal is based upon two grounds: first, that at the date of definite location of the road, the land was free from adverse claim, and the title therefore passed to the company; that neither Popp nor Hawthorne was asserting any claim to the land at that time, nor did either have any controversy with the company prior to the passage of the act of July 1, 1898; and that inasmuch as settlement was made upon unsurveyed land, it is optional with the company whether or not it will relinquish the lands involved.

In support of the first ground, namely, that upon definite location of the road title vested in the railway company, it is submitted that the decision of the Department of December 12, 1907, in the case of Sylvester H. Beatty, not reported, should control the disposition of this case. It is claimed that Beatty settled upon the land prior to survey and prior to the act of 1898; that he took no steps to protect

his settlement claim and had no controversy pending with the company at the date of the act of 1898; and that as the Department in that case held that the issue of the patent in favor of the railway company was an adjudication that the land passed under the grant, so it should be held in this case, that, there being no controversy between Hawthorne and the company at the date of the act, the case does not come within its provisions. Another reason assigned in support of this contention is that subsequent to 1898, namely, on June 3, 1901, Hawthorne made homestead entry No. 2644 for land in section 12 adjoining without any reference whatever to said lot 2 of section 7. The decision of the Department of July 11, 1908, in the case of Alexander B. Fraser, is also cited in support of this contention. In that case Fraser did not claim any settlement upon the land prior to July, 1907, but based his claim upon the fact that he had purchased the rights of the original settler who had initiated the claim more than eleven years prior to that time.

It is at once apparent that the claim of the company in this connection is not supported by the decisions cited. In the Beatty case, the land had been surveyed in 1894, and in 1896 patent was issued to the company, and Beatty, while alleging settlement prior to survey, did not take any action looking to the perfection of his claim until 1901. That application was rejected and no appeal was taken, and upon his second application to enter, presented April 21, 1906, more than ten years after the issuance of the patent to the company, the decision of the Department was rendered holding that no good reason appeared for reopening the case. In the case under consideration, however, on the day of the filing of the plat Hawthorne filed in the local office his claim to the land, and declared his election to retain the same. Until the land was surveyed and the plat filed he could not have his claim recorded in the land office. The decision in the Beatty case was based upon the fact that Beatty did not present his claim within ninety days from the filing of the plat of survey.

The Fraser case cited by the company in nowise supports the latter's contention, because the Department has uniformly held that the purchaser of a squatter's right acquires no rights thereby against the Government.

Respecting the second ground of appeal, it may be said that the Department has construed the proviso of July 1, 1898, *supra*, concerning settlement upon unsurveyed odd sections within the limits of the grants to the company, as having reference only to settlements made subsequent to the passage of the act, because where settlements had been made prior to the act, provision for the disposition of such cases was made in other portions of the act. In construing this act

of 1898 the Supreme Court said in the case of *Humbird v. Avery*, *supra*, that:

If any rights had become vested in the Northern Pacific Railroad Company which could not, against or without its consent, be effected by an enactment like that of 1898, then the objection to legislation, on the ground that it interfered with vested rights, was waived by the acceptance of the act by its successor in interest; for it was entirely competent for the latter company if it succeeded to all the rights of the railroad grantee, to agree to such a settlement as that devised by Congress. The rights acquired by the definite location of the road, and any selection of lands based thereon, became, upon the acceptance of the act, and so far as that company was concerned, subject to such settlement as the land department might legally make under that act. It could not by any sale or contract, made after the acceptance of the act, interfere with the full execution of its provisions. And the plaintiffs who claim to have purchased from the successor in interest of the railroad grantee can occupy no better position than the company from which they purchased.

It will thus be seen that the very question in issue in the case of *Humbird v. Avery* is also in issue in this case, namely, the right of the company to sell land within the granted limits after definite location and subsequent to the passage of the act of 1898. That act was intended for the adjustment of just such conflicting claims as this, and the first right of election as to whether the land involved should be retained was awarded the individual claimant who had purchased, settled upon, occupied, or claimed land under some law of Congress. As stated by the Supreme Court in the case cited, if the railroad company, so far as the act of 1898 was concerned, could notwithstanding the acceptance of this provision and on the day after such acceptance have sold or contracted to sell its right, title, and interest in and to all the lands embraced by those provisions, there would have been nothing left whatever to which the act could apply, and thus the company could have defeated the purpose of the act, the provisions of which it had formally accepted.

The facts respecting Hawthorne's settlement and occupation of this land as found by your office and the local office cannot now be questioned, because the adverse parties, though duly notified thereof, failed to appeal from such finding. The statement of the attorneys for the railway company that Popp did not appear at the hearing, but rather relied upon his purchase from the railway company, is erroneous, because the record shows that Popp was present at the hearing and testified in his own behalf.

From what has been stated, it follows that the case is one for adjustment under the act of 1898, and unless the company will within some reasonable time to be fixed by your office file a relinquishment, Hawthorne, in the absence of any other objections, should be permitted to perfect entry, notwithstanding the claim of the company and its transferee.

The action of your office is accordingly affirmed.

SAN BERNARDINO VALLEY—ACT FEBRUARY 20, 1909.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 7, 1909.

REGISTER AND RECEIVER,
Los Angeles, California.

SIRS: The act of February 20, 1909 (Public—No. 248), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the public lands in section eight, township one south, range two west, and in sections two, four, eight, ten, and twelve, in township one south, range three west, San Bernardino base and meridian, in the State of California, are hereby withdrawn from settlement and entry and reserved for the purpose of aiding in the conservation of the waters of the San Bernardino Valley: *Provided*, That this act shall not defeat any vested right which has attached under any pending entry or location.

SEC. 2. That any individual or association of individuals, or any company or corporation may have the right under such rules and regulations as the Secretary of the Interior may prescribe, to conduct the said lands and to distribute over them any flood or waste waters not otherwise appropriated, and to build the necessary engineering works, for this purpose, to the end that said flood or waste waters may sink into the sands and gravels of said lands, thereby increasing and replenishing the supply of underground water in the San Bernardino Valley.

1. The act withdraws the lands described from settlement and entry and reserves them for the purposes mentioned. It also grants to any individual or association of individuals or any company or corporation the right to conduct to said lands and to distribute over them any flood or waste waters, not otherwise appropriated, and to build the necessary engineering works for said purpose.

2. No right of way is granted by said act, nor is any right given to take material for the construction of any of the works, the right being in the nature of a license.

3. The right given to conduct water to said lands necessarily includes the right to cross the public lands of the United States with canals, pipe lines, etc., and any applicant desiring to proceed under said act must have an accurate survey made of the proposed works and must prepare and file a map and field notes in duplicate, evidence of the right to appropriate the water, etc., following the instructions contained in the circular of June 6, 1908, issued under the act of March 3, 1891 (26 Stat., 1095), pages 1 to 11, inclusive, changes in Forms 3 and 4 being made so as to refer to this act, and to the purpose for which the application is filed.

FRED DENNETT, *Commissioner.*

Approved:

R. A. BALLINGER, *Secretary.*

RAILROAD GRANT—SETTLEMENT—INSANE SETTLER—ACTS OF
AUGUST 5, 1892, AND JUNE 8, 1880.

FITZGERALD v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL.

Inasmuch as the act of August 5, 1892, was passed for the purpose of adjusting conflicts and avoiding litigation, the company in making lieu selections thereunder should not select lands at the time known to be claimed by a settler, and thus create another conflict and further litigation.

Failure to produce record proof of marriage will not defeat the right of the widow of a deceased insane settler to complete his claim under the provisions of the act of June 8, 1880, where it is shown that the settler lived with and held her out to the world as his wife.

In completing the claim of an insane homestead settler under the act of June 8, 1880, proof of citizenship, or even that the settler had ever declared his intention to become a citizen, is unnecessary.

A settler upon unsurveyed land who in good faith complied with the requirements of the homestead law as to settlement and became insane is entitled to the benefits of the act of June 8, 1880, as fully as though he had regularly made entry of surveyed lands.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 8, 1909.* (S. W. W.)

The St. Paul, Minneapolis and Manitoba Railway Company and Hugh J. O'Hare have appealed from your office decision of June 20, 1908, holding that Blanche Fitzgerald is entitled as the widow of Thomas Fitzgerald, deceased, to make entry and submit final proof under the homestead law for the SW. $\frac{1}{4}$, Sec. 24, T. 22 N., R. 8 W., Olympia, Washington, land district.

The material facts disclosed by the record and set forth in your office decision, may be stated as follows: February 24, 1896, the railway company selected the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section 24, per list No. 4, under the provisions of the act of August 5, 1892 (27 Stat., 390). At that time the land was unsurveyed, and the plat having been filed in the local land office June 14, 1905, on that day Hugh J. O'Hare presented his homestead application for said southwest quarter, alleging settlement in 1897. Mrs. Fitzgerald, on July 10, 1905, filed her homestead application for the whole of the southwest quarter, alleging settlement in 1894.

September 13, 1905, the company filed its supplemental list, No. 4d, adjusting its selection to the public surveys, showing the conflict still existing as to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of the said section. Accordingly, the local officers rejected O'Hare's application and ordered a hearing between the railway company and Mrs. Fitzgerald, which was held December 16, 1905.

The register and receiver decided that Mrs. Fitzgerald was entitled, as the widow of Thomas Fitzgerald, deceased, to make homestead entry of the land applied for by her, and this action was af-

firmed by your said office decision of June 20, 1908, and, as stated above, both the company and O'Hare have appealed to the Department.

Your office decision found that Thomas Fitzgerald settled upon the land in 1891, at which time he built a log house thereon and furnished it with the necessary articles for the purpose of maintaining residence thereon; that he commenced residence upon the land and did some clearing that year; that in 1894-1895 he built a new house of split cedar boards near the first one, both of which were upon the 40-acre tract in conflict; that his action in building the second house was in anticipation of his taking his wife upon the land, as she was at that time living in Shelton in a small house owned by him at that place; that he was on the land every year from 1891 until he was removed about March, 1897, to the insane asylum, where a few months afterwards he died; that when not on his claim he was at times working in logging camps or cutting wood, and was also interested a short time in a saloon at Shelton, but was there only at times and withdrew from that business in 1895; that in 1894, about one and three-quarters acres were slashed, and a half acre put under cultivation, the total improvements being worth from \$500 to \$600.

The decision further found that in May, 1897, after Fitzgerald's death, Mrs. Fitzgerald, as his widow, visited the land and stayed a few days, when she returned to Shelton and had not since been upon the place, having spent most of her time in Alaska.

Your office decision held that as more than five years had elapsed after the date of Fitzgerald's settlement upon the land before his removal to the insane asylum, and that as his entry might have been perfected by any person legally authorized to act for him during his disability if the land had been surveyed, in view of the provisions of the act of June 8, 1880 (21 Stat., 166), his widow should be allowed to complete the entry.

Respecting the claim of O'Hare, your office decision held that his application was properly rejected for reason of conflict with the company's selection; that he alleged settlement in 1897, subsequent to the date of the selection by the company, and the evidence showed that following the removal and death of Fitzgerald, O'Hare went upon the land, took possession of the improvements and held the place until June, 1904, when he was warned off by the Forest Supervisor, the land having been included in the Olympic National Forest by the proclamation of February 22, 1897, which became effective March 1, 1898. In addition to the conflict with the company's selection, the conflict with the settlement claim of Fitzgerald, which your office held had been established, was assigned as an additional reason for the proper rejection of O'Hare's claim.

The appeal of the company assigns error in your decision, first, in finding that Fitzgerald had complied with the provisions of the homestead law from the time of his alleged settlement in 1891 to the time of his death; second, in holding that evidence of the citizenship of said Fitzgerald was not necessary; third, in not holding that Blanche Fitzgerald, the alleged widow of the settler, had wholly failed to comply with the provisions of the homestead law after the death of her alleged husband; and fourth, in holding and deciding that said Blanche Fitzgerald is the widow of the said Thomas Fitzgerald and as such entitled to complete his alleged homestead.

The appeal of O'Hare alleges error in your decision, first, in holding that the homestead claim of Blanche Fitzgerald is valid; second, in ignoring the fact that he, O'Hare, was denied the right in the local land office to introduce evidence at the hearing in support of his application; third, in holding that were it not for the Fitzgerald settlement, residence and application, the land would have passed to the railway company under its selection; and fourth, in not holding that the inclusion of the land within the Olympic Forest operated to cancel the railway company's admitted selection.

Respecting the matter of settlement, residence, and cultivation on the part of Fitzgerald, it will suffice to say that the local land officers, who tried the case and had the witnesses before them, found that Fitzgerald had maintained such residence on the land as the homestead law requires. This finding was concurred in by your office and, under these circumstances, the Department is not disposed to question the correctness of that conclusion. As the Department has heretofore repeatedly held, a selection by the railway company under the act of 1892, should not put in issue, as would an adverse settlement claim maintained in all respects as required by law, the settlement, residence and cultivation of a homestead claimant. The act of 1892 was passed for the purpose of adjusting conflicts, of avoiding litigation, and the record in this case shows that the selecting agent of the railway company, when examining this land prior to its selection by the company, found notices posted thereon by Fitzgerald to the effect that he claimed the land as his homestead. This, of itself, was sufficient notice to the company that the land was claimed by a settler and that it was not subject to selection under the act of 1892.

Respecting the allegation that Blanche Fitzgerald had failed to prove her marriage to the settler, it will be sufficient to say that while there was no record proof of the marriage, the woman testified that she had in the month of December, 1891, gone through the marriage ceremony, conducted by an alleged justice of the peace, in the city of Seattle. The railway company attempted to rebut this evidence by furnishing record evidence to show that no license had been issued for

such a marriage and that there was no such justice of the peace in Seattle as the one named by Mrs. Fitzgerald. It was proved, however, at the hearing that Fitzgerald lived with the woman as his wife and as such introduced her to his friends and acquaintances and, moreover, that in an application made for life insurance in some order he named her as his wife his beneficiary.

This is believed to be sufficient to justify the finding of your office that there was a marriage. See *Shank et al. v. Wilson*, decided by the Supreme Court of Washington, December 29, 1903 (74 Pac. Rep., 812).

It is earnestly argued by the railway company that Mrs. Fitzgerald failed to prove that her husband was a citizen of the United States or even that he had declared his intention to become such, and reference is made to the testimony of one of the witnesses in behalf of Mrs. Fitzgerald to the effect that the settler had stated that he was born at some place in Canada. Opposed to this, however, is the testimony of Mrs. Fitzgerald who stated that Fitzgerald had informed her that he was born in Michigan. Your office in disposing of this question referred to the decision of the Department in the case of *Eggert Martens* (34 L. D., 167), where it was held that it is not necessary in invoking the confirmatory provisions of the act of June 8, 1880 (21 Stat., 166), in instances where a homesteader has become insane, to show that he was a citizen of the United States, it being only necessary to show that he had complied with the provisions of the homestead law up to the time of becoming insane.

Counsel for the company attempts to distinguish that case from the one under consideration because *Martens* was shown to have declared his intention to become a citizen, whereas in this case there is no evidence whatever that Fitzgerald had even declared his intention. However, after careful consideration of the matter the Department in the *Martens* case stated:

If, as hereinbefore shown, it was the intention of Congress to relieve the insane homesteader from those things which he could not do, the amendment was made upon the theory that the word citizenship as used in section 2291 of the Revised Statutes did not include the affidavit of allegiance required by the same section, but inasmuch as an oath of allegiance is the final act in becoming citizens, it was evidently believed that to relieve the homesteader from taking an oath of allegiance was also to relieve him from all proof of citizenship.

It is not believed that under the circumstances of this case the failure of Fitzgerald to enter his claim of record in the land office would operate to defeat his rights or those of his widow under the said act of 1880. Since the act of May 14, 1880 (21 Stat., 141), the right of the homestead settler may be initiated by and arise from the act of settlement and not from record of the claim made in the land office. See the decision of the Supreme Court of the United States in the case of the *St. Paul, Minneapolis and Manitoba Railway Com-*

pany *v.* Donohue (210 U. S., 21, 30). Thus a party who had complied with the requirements of the homestead law as to settlement on unsurveyed land was just as much a homesteader within the meaning of the act of June 8, 1880, *supra*, as was a party who had regularly made entry in the local land office upon surveyed lands.

The claim of O'Hare may be disposed of briefly. If the settlement claim of Fitzgerald was not a valid one, the land was subject to selection by the railway company and O'Hare's claim must necessarily yield to the company's selection. While it is true the railway company's selection conflicted with O'Hare's settlement claim only as to one 40-acre tract of the quarter section, and therefore, if O'Hare had so desired, he might have been properly permitted to cross-examine the witnesses who testified in behalf of Mrs. Fitzgerald, yet inasmuch as O'Hare did not allege settlement until 1897, it is not believed that he suffered any substantial injury by not being allowed to take part in the hearing.

From what has been stated it follows that your office decision must be affirmed.

SALE OF CERTAIN PUBLIC LANDS IN NEBRASKA—ACT OF MARCH 3,
1909.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 15, 1909.

REGISTER AND RECEIVER,
Lincoln, Nebraska.

GENTLEMEN: Your attention is invited to the act of March 3, 1909 (Public—No. 312), which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is authorized and directed to sell, upon sealed bids or at public auction, at his discretion, for cash, any or all of the vacant public lands in township eight north, range thirty west of the sixth principal meridian, in the State of Nebraska, which are embraced within the fractional subdivisions which resulted from disconnected surveys; and the expenses of such sale, including the cost of publication of such notices as said Secretary may direct, shall be paid out of the proceeds thereof.

SEC. 2. That the net proceeds of the sales authorized by this act shall be pro-rated by the Secretary of the Interior among and severally paid to the persons or the heirs of the persons who on February thirteenth, nineteen hundred and eight, were the owners of the lands in sections six, seven, eighteen, nineteen, thirty, and thirty-one, in township eight north, range twenty-nine west of the sixth principal meridian, in the State of Nebraska, in proportion to the loss in area severally sustained by such persons by reason of such disconnected surveys.

A plat of resurvey of township 8 N., R. 30 W., will be sent you, as also a supplemental plat, showing the different tracts to be sold under the terms of the above act.

These lands are to be offered by smallest legal subdivision and sold for cash to the highest bidder, but in no case at less than one dollar and twenty-five cents per acre, and they will not be open to other disposition.

Inclosed herewith is a notice which the register will cause to be published in some newspaper of general circulation in the vicinity of the land to be sold. You will also post a copy of the notice in your office and request the postmasters in that neighborhood to post copies thereof in their offices. The register will date the notice and also insert the day and hour when the sale will take place, which must be after at least thirty days' publication.

The sale will be held at Maywood, and both of you will proceed to that place and conduct the sale, the receiver retaining the money in his account of "Unearned Fees and other Trust Funds," and promptly on the conclusion of the sale you will report the amount received for each tract, together with an account of the expenses of the sale, which will include the cost of publication, and your actual necessary expenses, this to be accompanied with proper vouchers. The evidence submitted by persons claiming the right to share in the distribution of the proceeds, you will also transmit to this office.

An adjustment will then be made by this office of the amount due each person, as provided in section 2 of the act, and the receiver will be authorized to make payments to the parties shown to be entitled thereto.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

R. A. BALLINGER, *Secretary.*

RECLAMATION ACT—APPLICATIONS FOR WATER RIGHTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 20, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The following rules are laid down with reference to water right applications under the act of June 17, 1902 (32 Stat., 388):

1. Where water right application is presented covering only part of the irrigable area of a subdivision in private ownership you will accept it, provided it bears the usual certificate of the project engineer and the local water users association (where such association has been formed).

2. In case of sale by a private owner of part of the irrigable land covered by a subsisting water right application, the vendor, in order

to have his water right charges adjusted to the reduced acreage retained by him, will be required to present to you the following evidence:

a. Certificate of the proper officer having charge of the county records, showing record of a subscription for stock in the local water users association covering the land in question and that the land has been duly conveyed by the subscriber at a time subsequent to the recording of the stock subscription.

b. The certificate of the local water users association, under corporate seal, to the effect that proof has been presented to the association of the transfer of the land to the person named and that appropriate transfer has been made on its books of the shares of stock appurtenant to said land.

As an alternative, or in case no association has been organized on the project, the vendor should so arrange that his vendee shall promptly make a water right application for the irrigable land within the tract conveyed to him, and upon presentation and acceptance of such application, appropriate notation of such transfer, with a reference to the new water right application, will be made on the original or prior water right application.

3. In case of relinquishment by an entryman, whose entry is not subject to the reclamation act, of a part of the land included in his entry, appropriate notation will be made on his water right application, showing such relinquishment, and his charges will be reduced accordingly.

4. Where an entryman relinquishes a part of his entry under conditions described in paragraph 3 hereof, and the next person who enters the land so relinquished claims credit for installments paid by the first entryman, he must at the time of such entry file with his application to enter evidence showing that he is entitled to such credit; also a water right application covering the land entered.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

TIMBER AND STONE ACT—PRELIMINARY AFFIDAVIT—PERSONAL INSPECTION OF LAND.

MARY S. NESS.

The regulation of the land department that the preliminary affidavit of an applicant to purchase under the act of June 3, 1878, must be upon personal knowledge of the applicant based upon personal inspection of the land, except in the particulars in which the statute provides that the affidavit may be made upon information and belief, is a proper requirement, not in conflict with, or in excess of, the power conferred by the statute.

*Opinion of the Court of Appeals of the District of Columbia,
April 20, 1909.*

The relator petitioned the Supreme Court of the District for a writ of mandamus to compel James Rudolph Garfield, then Secretary of the Interior, to accept an application made by her for the purchase of a parcel of the public land under the timber and stone act. Demurrer to the respondent's return to the notice to show cause was sustained, and the writ ordered to issue. From this order, Secretary Garfield appealed. Having retired from office, his successor, Richard A. Ballinger, has been substituted as appellant.

The following facts are established by the allegations and admissions of the pleadings: On December 13, 1907, Mary S. Ness filed in the United States land office at Roseburg, Oregon, an application for the purchase of certain parts of a section of land in that district, under the provisions of the act of June 3, 1878. The affidavit accompanying said application is not made an exhibit to the petition, but is described as follows:

Showing that she was duly qualified as an applicant for said tract under said act of Congress, and that according to her information and belief, the said land was non-mineral, unfit for cultivation, chiefly valuable for its timber, not inhabited or covered by any *bona fide* improvement, or by a mining location; that she has not personally examined the land herself, because she was physically unable to do so, and furthermore, would not have understood its character even if she had done so, but that she had employed an expert woodsman to examine it for her.

On the same day, she filed the affidavit of Clark P. Devereaux, to the effect that he was the agent of the applicant, an expert woodsman, and understood the character and value of timber lands, and that the lands described were unfit for cultivation, chiefly valuable for their timber, containing no mining or other improvements, and no valuable deposit of mineral or coal, and that affiant had no interest in the application. The register and receiver of the local land office rejected the application, for the sole reason, as stated, that "applicant has not personally examined the land."

On appeal to the Commissioner of the General Land Office, the rejection was affirmed. The Secretary, on appeal to him, affirmed the decision of the Commissioner, and on August 20, 1908, entered a final order rejecting the said application.

The return of the Secretary avers that the requirement that an applicant shall make affidavit to personal examination of the land is statutory, and cannot be dispensed with, and that this has been the construction of the statute uniformly maintained in its enforcement. This construction is embodied in the regulations of the Secretary of the Interior of July 16, 1878, issued for the instruction of the local land officials in administering said statute.

The act of Congress approved June 3, 1878 (20 Stat., 89), provides, in section 1, for the sale of not exceeding 160 acres of public land unfit for cultivation, and chiefly valuable for timber and stone. Sections 2 and 3 read as follows:

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement, in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone, that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

Among the regulations prescribed by the land department immediately after the passage of the act is one which requires that the sworn statement shall be made upon personal knowledge of the applicant, except in particulars in which the statute provides that the affidavit may be upon information and belief.

1. Responding, first, to the persistent pressing of the question of jurisdiction to review the action of the head of an Executive Department, it is sufficient to say that this is not the case of one seeking to establish a title to lands as against the United States, but of one seeking to compel the performance of a ministerial duty imposed upon the officer by the terms of a statute; that the duty, if such, does not cease to be ministerial because it requires in some degree the construction of the language of a statute. *Roberts v. Valentine*, 13 App. D. C., 38; *Roberts v. U. S.*, 176 U. S., 221.

2. In legislation of this kind, requiring the performance of administrative duties by the head of a Department to put it in execution, it is usual, as was done in the foregoing statute, to confer the power to make appropriate regulations for carrying the same into effect. Such supplementary regulations have all the force of law, if not in conflict with the law itself, or in plain excess of its requirements. The officer is not authorized to make the law, but to prescribe reasonable regulations for its effective administration, not inconsistent therewith, or in addition thereto. *In re Kollock*, 165 U. S., 526, and cases there cited. *Davis v. Massachusetts*, 167 U. S., 43; *Williamson v. U. S.*, 207 U. S., 425.

The construction of a statute made by the Department charged with its administration, early made and uniformly followed for a number of years, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *U. S. v. Moore*, 95 U. S., 760. *Hastings &c. Ry. Co. v. Whitney*, 132 U. S., 357. *U. S. v. Finnell*, 185 U. S., 236, and cases there cited.

3. After a careful consideration of the provisions of this statute, we are not prepared to say that the regulations of the Department are in conflict therewith, or that the action of the Secretary rejecting the application is founded on an erroneous construction of its language. While extending its benefits to all citizens of the United States, and persons who have taken the necessary steps to become such, without regard to residence, the statute expressly requires that the oath shall be made in person before the local officer of the district in which the land lies, and seems to contemplate that it shall, in part, be made upon actual personal knowledge. The necessary facts that the lands shall be unoccupied, unfit for cultivation, and chiefly valuable for timber and stone, are capable of exact and certain statement, after its inspection. Whether there may be mineral deposits in the land is a fact that the average applicant would not

ordinarily be able to determine by going upon the land and making a careful examination. Hence, while the first statement must be positive, as of actual knowledge, the second may be upon belief merely.

While it is true, as stated in the case relied on by the appellee, and which will be reviewed later, that the statute does not expressly provide that the verification of the application shall be upon personal knowledge only, yet that intention seems to be clearly implied. If not so intended, why the insertion of the provision that the fact as to the existence of mineral deposits may be stated upon belief? This was wholly unnecessary, if it had been intended that the preceding facts might be stated as a matter of belief also. Moreover, the statute requires that the verification shall be by the applicant in person. It cannot be made in his name by an agent or attorney. *Martin v. Martin & Bowne Co.*, 27 App. D. C., 59. This requirement would be practically nugatory, if the affidavit of necessary facts could be made solely upon information derived from an agent. That it was the intention that the necessary positive statement of facts should be upon the personal knowledge of the applicant, necessarily to be acquired by examining the land, seems to be confirmed by the last clause of section 2, which declares that if any person shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same. If the entire affidavit can be made upon information and belief, it is difficult to see how the pains and penalties of perjury could be visited upon the applicant. If perjury could be maintained at all upon such an affidavit, the question of guilt would depend, not upon the falsity of the statement of the facts as to occupancy and unfitness for cultivation, but upon the falsity of the applicant's belief in the truth of the representations made to him in this regard by his agent or representative. It would be practically impossible to establish willful and corrupt false swearing in such a case.

The construction given to the statute by the regulations of the land department has been upheld in the Circuit Court for the District of Oregon, in a prosecution for perjury. *United States v. Wood*, 70 Fed. Rep., 485, 486. In that case it was said by Judge Bellinger:

It is competent under this statute for the proper officers of the Government, as a regulation in the sale of these lands, to require the affidavit of personal examination and personal knowledge on the part of the applicant. The oath required by the act of Congress providing for the sale of these lands contains two parts: one, that the land is unfit for cultivation, uninhabited and unimproved; and the other, that to the best of the belief of the applicant, the land contains no valuable deposits of mineral, etc. This last may be made on information; but the first statement necessarily implies a personal knowledge of the land. The requirement of the Department as to the affidavit of personal

examination is in conformity with the requirement of the first part of the oath provided by the statute.

A different construction has been given in a later case, by the Court of Appeals of the Seventh Circuit, upon which the appellee relies. *Hoover v. Salling*, 110 Fed. Rep., 43.

That suit was against a defendant holding under a patent. Complainant alleged that she had made application for the land, and made the preliminary oath in due form; that she had submitted the proof required by section 3, and tendered payment of the purchase price; that one Toole had made a later application, and filed a protest against complainant's entry, alleging that she had never been upon or seen the land, or any part thereof; that the Department rejected complainant's application, upon the ground that she had not complied with the regulation requiring a personal examination of the land, and issued the patent to Toole, under whom defendant held. A decree dismissing the bill was reversed. After reciting the procedure required by the statute, the court said:

It is clear to us, in view of this, that the statement is meant simply as an initial paper—the claim or pleading—upon which the machinery of the Land Office is to be set in motion. The statement is not accepted as proof, and it does not perform the office of proof; that must come at the hearing. It is in the nature of a petition to the land department, setting forth all the material facts upon which action is invoked, and is, in this general respect, analogous to verified petitions, or bills, in courts of chancery. . . . Section 2 of the act provides that the statement shall be verified by oath, but it does not, in terms at least, provide that the verification shall be on personal knowledge only, and shall not, in any of its particulars, be upon information and belief. We think we should apply to this section of the statute the rules adopted in analogous pleadings where verification is required; and, so doing, we cannot see why that portion of the statement relating to the character of the land—that it is uninhabited, is unfit for cultivation, and valued chiefly for timber or stone—may not be predicated upon information and belief. Any other interpretation would, in our opinion, import into the procedure a restriction not to be found in the procedure of the courts in analogous inquiries, and would defeat one of the main purposes of the act.

With the greatest respect for the learned court from whose opinion we have quoted, we are, nevertheless, constrained to say that we are not impressed with the soundness of its reasoning. We cannot regard the presentation of a verified application as a mere initial paper in the form of a pleading, setting forth facts thereafter to be established upon hearing. It is rather in the nature of "preliminary proof," as called in *Williamson v. United States*, 207 U. S., 459. As indicated in that case, there are two stages of hearing, the preliminary one, after which notice is published, and the second, or final one, after publication. This preliminary proof is the essential stage by which the applicant secures preemption. It is important, as well as reasonable, that such proof should be positive and direct, in order to

secure a preference over other applicants. While this proof is not made sufficient to warrant the issue of the patent, and must be followed by publication and supported by other satisfactory evidence that the land is of the character contemplated, that is to say, unoccupied, without improvements, unfit for cultivation, and chiefly valuable for timber and stone, it is sufficient as to other material facts, namely, that the application is made in good faith, for the exclusive benefit of the applicant, and that he has not, directly or indirectly, made any agreement or contract by which the title he might obtain should inure to the benefit of any other person than himself. As to these, the preliminary proof is all that is required by the statute; and the land department has no power to require more. *Williamson v. United States, supra.*

We regard the analogy of the procedure under this statute as rather with those special statutory proceedings which are required to be supported by affidavit, than with the ordinary procedure in accordance with the equity rules. In the procedure of the first kind, providing for the issue of attachments, temporary injunctions, etc., the required affidavit may be separate, or by way of verification of initial pleading; but in either case, the facts must be alleged as within the personal knowledge of the party, and not upon information and belief. *City of Atchison v. Bartholow*, 4 Kans., 124; *Thompson v. Higginbotham*, 18 Kans., 42; *Dyer v. Flint*, 21 Ill., 80; *Gautry v. Dome*, 51 N. Y., 84; *Neal v. Gordon*, 60 Ga., 112; *Lewis v. Connolly*, 29 Neb., 222.

Our conclusion is that the regulation of the land department is not in conflict with, or in excess of, the power conferred by the statute. The judgment must therefore be reversed, with costs, and the cause remanded, with directions to dismiss the petition.

Reversed.

SETH SHEPARD, *Chief Justice.*

SOLDIERS ADDITIONAL—PERIOD OF SERVICE—RECORD EVIDENCE.

WALTER H. LONG.

The record of the United States relating to the enrolment, muster, and discharge of members of its armies must control in all actions of the departments of the government; and the fact that a State record with respect to the service of a soldier does not agree with the United States record can not be considered as in any wise impeaching the record of the government. The right of additional entry conferred by section 2306 of the Revised Statutes is dependent upon service for ninety days by the soldier; and there is no authority for crediting him with the term of his enlistment where he was discharged for disability before serving ninety days.

First Assistant Secretary Pierce to the Commissioner of the General
(F.W. C.) *Land Office, April 26, 1909.* (J. R. W.)

Walter H. Long appealed from your decision of January 21, 1909, rejecting his application as assignee of James H. Dunn, under section 2306 of the Revised Statutes, to enter the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 14, T. 3 S., R. 22 E., N. M. M., Roswell, New Mexico.

The War Department record shows that Dunn performed military service in Co. E, 120 Illinois Volunteer Infantry, from October 29, 1862, to January 24, 1863, on an enlistment for three years, when he was discharged on surgeon's certificate of disability. He made original homestead entry May 29, 1865, at Junction City, Kansas, for lots 1 and 3, Sec. 30, T. 13 S., R. 3 E., 72.52 acres, canceled on relinquishment December 28, 1866. You rejected the application because the soldier rendered only eighty-eight days' service.

The appeal assigns two errors: 1. In holding the soldier rendered but eighty-eight days' service, the contention being that he rendered ninety days' service. 2. In holding that he must be credited with the period of service only, instead of the term of his enlistment, his discharge having been for disability.

With the appeal is filed a certificate by the Adjutant General of Illinois, made March 8, 1909, that the records of the State office show the date of Dunn's discharge was January 26, 1863, and Dunn makes affidavit that was the date of his discharge. It is argued that as the two records disagree, recourse can be had to parol evidence.

The record of the United States relating to enrollment, muster, and discharge of members of its armies must control in all actions of the departments of the government. It is an original record made from reports of its officers in the field in course of their duties. The State record is, at most, a secondary one, made from returns or reports not required under any law of the United States, and can not be considered as impeaching the record made by officers of the United States. It would be otherwise were there a discrepancy of dates between the original certificate of discharge and the record made by the War Department from reports of the officer who executed and delivered it.

As to the second contention, it can not be admitted that the provisions of section 2305 of the Revised Statutes, crediting the period of enlistment upon residence when the discharge is due to disability incurred in line of duty, should be read into section 2304. The sections have different purposes. Section 2304 is express in its terms and gives a bounty or reward to "every private soldier and officer who has served in the army of the United States during the recent rebellion for ninety days." The law is express and clearly defines

the class entitled to its benefit. There is no room for construction. Section 2305 had a different purpose. It gives credit for the period of service upon the required period of residence by homestead settlers, and in doing so allows credit for the whole period of enlistment, if disability causing his discharge was incurred in "line of duty."

Section 2306 is also express, in that its benefits are granted to the class "entitled under the provisions of section twenty-three hundred and four." Congress made its intent clear and that controls the executive.

Your decision is affirmed.

BOVEY *v.* NORTHWESTERN DEVELOPMENT COMPANY.

Motion for review of departmental decision of November 24, 1908, 37 L. D., 264, denied by First Assistant Secretary Pierce, April 26, 1909.

CONFIRMATION—COAL LAND—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

HERMAN *v.* CHASE ET AL.

The proviso to section 7 of the act of March 3, 1891, does not preclude proceedings subsequent to the expiration of two years from the issuance of final certificate with a view to investigating and determining the known character of the land at the date of final entry, and cancelling the entry should the evidence show that the land was at that time known to be chiefly valuable for coal.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 26, 1909.* (E. P.)

June 30, 1904, homestead final certificate of entry issued to Benjamin D. Chase for the NE. $\frac{1}{4}$, Sec. 26, T. 57 N., R. 85 W., Buffalo land district, Wyoming. Two days earlier Chase executed a warranty deed purporting to convey the above described tract to one Robert McPhillamy; and one Peter Kooi subsequently, by mesne conveyance, became the record holder of title to the land.

October 15, 1906, A. M. Herman filed a protest against the entry, charging, *inter alia*, that the land is chiefly valuable for coal.

Hearing was had on this protest, commencing November 19, 1907, at which Kooi intervened, and from the testimony submitted the local officers found the land to be more valuable for coal than for agricultural purposes, and recommended that the entry be canceled.

On appeal by Chase and Kooi, your office, by decision of September

15, 1908, found that the land was known to be chiefly valuable for coal at and prior to the date of the submission of the homestead final proof, and accordingly held the entry for cancellation.

From this decision Chase and Kooi appeal to the Department.

It was urged by appellants at the hearing, and in their appeal from the decision of the local officers, that the land department is without jurisdiction to entertain the protest filed in this case for the reason that more than two years after the date of the issuance of final certificate had elapsed when the protest was filed, and that therefore the entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099); and that point is insisted upon in the present appeal. The proviso in question is as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The same contention was made in the case of Yankee Fuel Company, assignee of Mary M. Sperry, which, like the case at bar, was one wherein a proceeding was instituted against a homestead entry more than two years after the issuance of final receipt and certificate, on the charge that the land was known at the time of final entry to be chiefly valuable for coal. The contention was overruled (decision of May 2, 1908, unreported) in that case, in which the views of the Department are thus expressed:

The question presented is whether the entry is confirmed by the act of March 3, 1891, *supra*.

The act confirmed entries of classes named, all of which as generally understood and named in the statutes authorizing them, are for lands commonly spoken of as agricultural as distinguished from mineral lands. Public lands are by law divided into distinct classes for private appropriation and administrative disposal. By section 2318, Revised Statutes, mineral lands are "reserved from sale, except as otherwise expressly directed by law." "Expressly" has significance. General legislation for disposal of public lands has no application to mineral land unless it is in terms referred to. In dealing with entries of nonmineral character Congress cannot be supposed to legislate as to mineral land or mineral entries.

In *Garner v. Mulvane* (12 L. D., 336), coal entries are classed as preemptive in procedure, the filing of a declaratory statement giving exclusive privilege to purchase within a fixed time. This, however, does not make them preemption entries within the meaning and intent of Section 7 of the Act of March 3, 1891, which referred to a group of entries under acts for disposal of public lands, generally called agricultural, not specially classed for disposal under conditions and upon prices fixed by statute, applying particularly to them as containing deposits of precious metals, coal, and the like, valuable chiefly for their minerals, rather than for their surface growths or agricultural utility.

Congress therefore, did not intend by the act of March 3, 1891, framed in general terms, referring to acts for disposal of the general, nonmineral, public domain, to confirm entries for lands specially classed for disposal under special conditions at specified prices made applicable to them distinctly. To hold otherwise would be, by construction of a general act, not referring to mineral or specially classed lands, to extend its operation into the distinctly different field of specific legislation not in the mind of Congress when framing and considering the act.

Sperry's entry was of land represented by her to be nonmineral and so appeared upon the records of the Land Office. If that representation and supposed character of the land was true at the date of her final certificate, the entry is within the terms and benefits of the act of March 3, 1891, *supra*, and is confirmed against inquiry or charge other than whether the land was in fact, as then known, of special character excluding it from that kind of entry. If it was at the time of her commutation proof known to be chiefly valuable for its deposits of coal, it was subject to disposal only under the special laws for sale of that specific class of land, at a special price and upon specific conditions applicable to that class, under the coal-land laws. If her entry was made for land *then known* to be valuable chiefly for its coal, the entry was in violation of law and invalid in its inception. The Land Department has no authority to patent the land to her on a homestead entry. If the land was then known to be chiefly valuable for the coal contained therein, her representation and final proof to the contrary were fraudulent.

* * * * *

The present proceeding is substantially upon a charge that her entry and final proof were by fraud or mistake made for land not subject to homestead entry because known to be coal land. If the charge is true, a patent, if issued, should be proceeded against as issued in violation of law. It would be mere imbecility for the Secretary on such facts, if true, to hold himself concluded by the former inquiry, to issue the patent, and then to request the Attorney-General to bring suit for its cancellation. He has the power, and it is his duty, to prevent the issue of a patent in such a case. *United States v. Detroit Lumber Company* (200 U. S., 321, 338). Upon the charge made the order for hearing was within your discretion, and the motion for confirmation of the entry was properly denied.

So, too, the above-cited proviso has recently been held, in the case of *James A. Cobb et al.* (37 L. D., 181), to have no validating effect upon, or application to, a *void* entry, and otherwise to embrace within its purview only the particular classes of entries therein mentioned.

For reasons set forth in the foregoing quotation, it is held that the fact that the present proceedings were not instituted until the expiration of more than two years from the date of the issuance of final certificate does not preclude the Department from ordering an investigation for the purpose of determining the known character of the land at the date of such final entry, and cancelling the latter should the evidence show that the land was at that date known to be chiefly valuable for coal.

Having so disposed of this contention of the appellants, it remains merely to be determined whether the evidence sustains the charge

contained in the protest. It is sufficient to say that the record in the case has been carefully examined by the Department and that no reason is found to disturb the finding of your office upon that question.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT-INDEMNITY SELECTION-SECOND INDEMNITY
BELT-MINERAL LAND BASE.

SANTA FE PACIFIC RY. CO. *v.* NORTHERN PACIFIC RY. CO.

Lands lost to the grant made to the Northern Pacific Railway Company by the act of July 2, 1864, by reason of being mineral in character, will not support a selection of other lands in lieu thereof within the second indemnity belt provided by the joint resolution of May 31, 1870.

No rights are acquired by an application under the act of June 4, 1897, to select lands covered by an earlier railroad indemnity selection, until the prior selection has been canceled upon the records of the local office.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, April 26, 1909. (F. W. C.) (S. W. W.)

With your letter of November 21, 1908, you transmitted to the Department the appeal of the Santa Fe Pacific Railway Company from your office decision of June 23, 1908, rejecting its applications to select, under the act of June 4, 1897, certain lands in townships 140 and 143 N., R. 36 W., Crookston land district, Minnesota, and with your letter of January 19, 1909, you transmitted the appeal of the Northern Pacific Railway Company from your separate decision of the same date, June 23, 1908, declining to accept the bases submitted in support of certain indemnity selections in list 12, embracing the same lands.

The applications of the Santa Fe Pacific Railway Company were rejected for the reason that when they were presented, February 9, 1907, the lands applied for were embraced in the uncanceled selections of the Northern Pacific Railway Company, *supra*, and your action in refusing to accept the bases submitted by the Northern Pacific Railway Company in support of its selections was due to the fact that the said selections embraced lands in the second indemnity limits of the grant made to the Northern Pacific Railway Company, in the State of Minnesota, while the bases offered in substitution of the bases formerly submitted were mineral lands in the State of Montana.

These selections of the Northern Pacific Railway Company have been pending before the land department for more than twenty-five years and they have heretofore been the subject of a number of de-

cisions by this Department. It is therefore deemed necessary to state briefly the facts leading up to the present situation.

The Northern Pacific Railway Company's selections were filed in 1883, and the bases assigned in support thereof were shown upon the records of the land department to have been disposed of under private sales and entries subsequent to July 2, 1864, the date of the act making the grant to the Northern Pacific Railroad Company.

The said selections were not approved, nor does any question appear to have been raised respecting their validity until after the decision of the Department in the case of Northern Pacific Railway Company *v.* Rooney, decided October 18, 1899 (29 L. D., 242), wherein it was ruled that the tracts assigned by the company as bases for these selections were within the limits of the grant made by the act of May 5, 1864, to the Lake Superior and Mississippi Railway, and were withdrawn on account of that grant, May 26, 1864, all of which was prior to the passage of the act of July 2, 1864, making the grant to the Northern Pacific Railroad Company, and that therefore as the lands assigned as bases were not lost to the Northern Pacific Railway Company subsequent to the passage of the act of July 2, 1864, they would not support selections made in the second indemnity belt. Accordingly the selections in question were held for cancellation by your office decision of August 10, 1901, and the company appealed to the Department, where by its decision of November 5, 1902 (not reported), the action of your office was affirmed. A motion for review of the decision of November 5, 1902, was denied by the Department on January 29, 1907.

Notwithstanding the foregoing action of the Department, it seems that the final action looking to the actual cancellation of the lists was not taken until October 3, 1908, when your office directed the local land office at Crookston to cancel the said selections. Whether or not cancellation of these selections has been noted upon the records of the local office does not appear from the record, but on October 15, 1908, your office directed the register and receiver at Crookston by telegraph to suspend action under the letter of October 3 ordering the cancellation of said selections.

It seems that the telegram directing the suspension of action in this matter was sent for the purpose of postponing the final disposition of the case until the Department should decide similar questions pending before it in other cases.

By its decision of March 26, 1908 (36 L. D., 328), respecting similar selections, the Department had held that there was merit in the argument of the Northern Pacific Railway Company that, having used losses in support of selections in the first indemnity limits which, if free, might be used in support of selections in second indemnity limits, and there being other unsatisfied losses available for the first

indemnity selections, the company should be allowed to release those bases formerly used, upon the substitution of other unsatisfied bases, and permit the bases so released to be used in support of the second indemnity selections. It was upon the authority of that decision that the bases in question were substituted by the company, but as shown above, your office on June 23, 1908, held that mineral bases in the State of Montana could not be used to satisfy second indemnity selections made in 1883 in the State of Minnesota.

The Northern Pacific Railway Company alleges in its appeal that the purpose of substituting mineral bases in Montana is merely to maintain the validity of the original lists to the end that the original selections may be adjusted under the act of July 1, 1898 (30 Stat., 597, 620), because the company admits that adverse claims have intervened, and that under departmental decision of March 26, 1908, *supra*, all intervening claims must be recognized.

The Northern Pacific Railway Company argues further that mineral bases will support selections within any limits of the company's grant, and that the company should be allowed at least to substitute such bases in support of the original selections made in 1883, in order that the vitality of such selections may be maintained to the end that the entire matter may be adjusted under the act of 1898, *supra*.

The act of July 2, 1864 (13 Stat., 365), making the grant in support of the Northern Pacific Railroad Company, provided that—

all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road may be selected, as above provided.

The selections provided for in the preceding portions of the act were undoubtedly the indemnity selections authorized where lands within the primary limits had been sold or otherwise disposed of by the Government.

It is certain that the act of 1864 had no reference to the second indemnity belt in which the lands involved herein are situated, for the reason that such belt was not provided for until the joint resolution of May 31, 1870 (16 Stat., 378), was adopted. It is not understood, therefore, how the provisions of the act of 1864 could possibly provide for the making of selections within a belt of country which was not recognized until 1870.

It is not believed that the bases offered in substitution by the Northern Pacific Railway Company in this case are sufficient to support the selections, and the company, although offered ample opportunity, having failed to furnish satisfactory bases as it was authorized to do by the decision of March 26, 1908, your action in refusing to accept the bases offered was correct and must be affirmed.

It is submitted in behalf of the Santa Fe Pacific Railway Company that the effect of the previous departmental decisions was to cancel the selections proffered by the Northern Pacific Railway Company, and that it was only by numerous motions for review and re-review that such selections were not actually canceled on the records of the local land office, in view of which it is contended by the Santa Fe Pacific Railway Company that its lieu selections under the act of 1897 aforesaid should be recognized.

This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899 (29 L. D., 29),³³ which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been canceled upon the records of the local land office.

The term "entry" as used in this circular has been construed uniformly to include any claim under the public land laws which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administration, and it has been uniformly followed since its promulgation.

Inasmuch as the record shows that the selections of the Northern Pacific Railway Company have not been canceled at the time of the applications submitted by the Santa Fe Pacific Railway Company, it follows that the latter's selections were properly rejected, and the action of your office in this respect is likewise affirmed.

Upon the cancellation of the selections of the Northern Pacific Railway Company, the lands embraced therein will become subject to entry by the first legal applicant.

RUTLEDGE *v.* STATE OF MINNESOTA.

Motion for review of departmental decision of January 15, 1909, 37 L. D., 397, denied by First Assistant Secretary Pierce, April 26, 1909.

WYANDOTTE SCRIP—PATENTS—TREATY OF JANUARY 31, 1855.

HENRY J. ALLEN.

Patents on locations of Wyandotte scrip must, under the express terms of the treaty of January 31, 1855, issue "in the names of the reservees."

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 26, 1909.* (E. F. B.)

May 13, 1898, Henry J. Allen, assignee, filed in the local office at Prescott, Arizona, application to locate forty acres of unsurveyed

land (T. 16 N., R. 2 E.), with Wyandotte Certificate No. 9, Indian B-250, being one of the sixteen pieces of scrip issued by your office to Henry Jacques or his legal representatives under the right granted by the treaty of March 17, 1842 (11 Stat., 581), and the treaty of January 31, 1855 (10 Stat., 1159).

Said location has since been pending in the local office, no action having been taken to perfect the same because the land still remains unsurveyed.

The circular of December 22, 1908 (37 L. D., 351), discontinued the practice of allowing the scrip and location papers to be retained in the local office where the location is made upon unsurveyed land, and directed that all such applications shall be transmitted to your office. Pursuant to that circular this application was transmitted to your office by the register and receiver of the local land office at Phoenix, Arizona, the land now being within that jurisdiction.

You thereupon took up the application for examination as to the right of the applicant to locate said scrip, and after noting that the treaty of 1855 confers upon the reservees, their heirs or legal representatives, the right to sell and convey the land located, and provides that patent shall issue in the name of the reservees, you held:

Said assignments are considered sufficient to warrant this office in considering Allen authorized to make the location as attorney in fact for the heirs or legal representatives of the reservee, Henry Jaques, and if he wishes to make the location as such attorney, patent to be issued in the name of Henry Jaques, he should so elect within sixty days from notice.

Advise him that if he does not do so or take an appeal herefrom, in accordance with rules of practice, the application will stand rejected without further notice.

Your decision is appealed from by T. E. Campbell, who appears as "Trustee for the estate of Henry J. Allen," alleging that Henry J. Allen purchased and obtained the scrip and in good faith located the same on the land in question, which has been in his possession for ten years. He contends that no protection would be given to him if the patent should issue in the name of the reservee, his heirs and legal representatives, and that no patent could issue in any event, as the land has not yet been surveyed.

By the 14th article of the treaty of 1842, the United States agreed to grant by patent in fee simple to certain named Wyandottes and their heirs (Henry Jaques being one of the persons named) one quarter section of land out of any lands west of the Missouri River, "to be selected by the grantees, surveyed and patented at the expense of the United States, but never to be conveyed by them or their heirs without the permission of the President of the United States."

By the treaty of January 31, 1855 (Article 9), it was provided that each of the individuals to whom reservations were granted by the 14th article of the treaty of March 17, 1842, or their heirs or legal representatives, shall be permitted to select and locate said reservations "on any government land" west of the State of Missouri, subject to preemption and settlement "said reservations to be patented by the United States in the names of the reservees, as soon as practicable after the selections are made; and the reservees, their heirs or proper representatives, shall have the unrestricted right to sell and convey the same, whenever they may think proper."

The treaty of 1855 removed the restriction upon alienation imposed by the first treaty, but expressly provided that the land shall be patented "*in the names of the reservees*," thereby indicating a purpose not to recognize a right or location except by the reservee in person, or by his duly qualified agent, whatever the powers of the agency may be, or whatever right and interest may have been conferred upon the agent under his power and authority from the reservee.

The prohibition against alienation of the land in the first treaty was removed by express terms in the second treaty; but in order to remove all controversies about the transfer of the right, it was provided that the patents shall be issued "*in the names of the reservees*," thus indicating a purpose to require all proceedings in the location and selection of such right, including the issuance of the title, to be in the name of the reservee.

The ruling of your office that the instruments under which Allen was allowed to make said location are sufficient to warrant your office in recognizing him as attorney in fact for the heirs and legal representatives of Henry Jaques, and that upon the completion of said location the patent will issue in the name of the reservee, following the terms of the treaty, is in accord with the practice heretofore prevailing and the rulings of the Department. To that extent it is affirmed; but the Department sees no reason why the location should not remain intact, subject to be completed in accordance with the present practice and requirements in such cases, or why, as a condition to such course, the locator should be required to elect within sixty days whether he will accept a patent issued in the name of the reservees. The land is yet unsurveyed, and no patent can now be issued. After the land has been surveyed and the location completed, a patent will be issued in the name of the reservee, following the terms of the treaty, and none other will be issued, either on this location or upon the location of other land under said right, whether the locator consents to it or not.

Your decision is modified accordingly.

PUBLIC RECORDS—EXAMINATION BY PUBLIC FOR PURPOSE OF MAKING COPIES.

E. L. CLARKE.

While the public records of local land offices and surveyor-generals' offices are open to inspection by the general public for information as to all matters in which an individual may have an interest, it is the duty of the officers having such records in charge, in the exercise of a sound discretion, to see that the privilege of examining and taking copies of the same is not abused by using the same merely for the purpose of obtaining information having no reference to any particular interest, with a view to selling the information thus obtained as opportunity may offer.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 26, 1909.* (E. F. B.)

With your letter of April 10, 1909, you transmit the appeal of E. L. Clarke from the decision of your office sustaining the action of the Surveyor-General of Wyoming refusing to permit appellant to have access to the records of the Surveyor-General's office for the purpose of making copies of plats and field notes of surveys in Sheridan County, Wyoming.

There is submitted in support of the appeal a mass of correspondence touching the matter complained of, which has been given full and careful consideration. The complaint of appellant is that he has been unjustly discriminated against; but it does not appear from the letters accompanying the appeal that the charge is sustained.

The controversy had its origin in a letter dated July 25, 1908, from appellant to the Surveyor-General, stating that he desired to obtain complete copies of the field notes and plats of public land surveys in Sheridan County, Wyoming, and all information on record regarding the location of the corners and lines establishing such surveys. He inquired as to the cost of furnishing certified copies of such surveys, and if the records are at all times open to public inspection and whether he can be permitted to examine said records in person for the purpose of making copies of them, and if at certain hours and on certain days, to state what hours and on what days.

To that inquiry the Surveyor-General answered that—

in so far as any one has occasion to learn of the public survey in any particular townships, the records are open to the public, and copies may be made during the regular office hours from 8:30 A. M. to 4:30 P. M.; or this office will prepare copies if paid for in advance on estimates made on request for copies of specified township plats or field notes of specified lines.

Appellant was then advised as to the cost of furnishing such copies.

By letter of August 1, 1908, appellant informed the Surveyor-General that his purpose in obtaining the copies was to enable him to prepare a correct map of the county, but as a "separate proposition" he desired copies of certain townships, which were furnished by the Surveyor-General. Appellant was then informed as to the probable cost of obtaining copies of the plats and field notes of all the townships in said county, and in a subsequent letter stated that employees of that office are no longer permitted to make copies of the records outside of office hours and to receive pay therefor, "but the records are open to the public, and you or any one designated by you are allowed to make copies from them during the regular hours of office."

In a letter to your office appellant stated that finding it impracticable to pay the cost of obtaining certified copies of the plats and field notes, he was forced to drop the idea of making a county map. He had, however, during the year been furnished by the Surveyor-General's office with copies of the field notes and plats of every survey applied for, upon paying the usual fee.

January 20, 1909, he visited Cheyenne, and notified the Surveyor-General that he had come for the purpose of making copies of the remaining townships in Sheridan County in order to "make me in the future immune from the trouble and delay of following the routine of sending to your office for copies of the records for every separate area desired to be surveyed."

The Surveyor-General in passing upon appellant's application, applied the rule governing the conduct of his office in respect to the inspection and copying of records, and appellant was requested to be more specific in his application, as will be seen from the following extract from his letter:

Kindly state specifically the records which you desire to copy, the time that such copy work will probably consume, and the persons for whom and the object for which said copies are to be made.

You should state, by township and range, what plats you desire to copy and also list by township what field notes you wish to make copies of. If there be any other miscellaneous plats and notes which you wish to copy, this will also be given in detail.

In this connection you are advised that the records of this office are open to inspection on the part of the public, subject only to the restriction that such examination shall not interfere with the orderly dispatch of public business.

The response of appellant to this requirement and the subsequent correspondence shows that he did not desire copies of the field notes and plats of the surveys of every township in the county, and all information pertaining thereto, for use in the prosecution of any contemplated work in which he then had any interest and which required the use of such records, but his real object was to secure such copies for any use, profit or advantage he might in the future derive from his possession of the same.

The records of the local land offices and of the Surveyor-General's offices are public records open to inspection by the general public for information as to all matters in which an individual may have an interest, and such rights and privileges are carefully guarded. The possession of copies of such records by individuals is not inhibited by law or regulation. It is, however, not only the right but the duty of the officers having charge of such records to see that the privilege of examining and taking copies of the same is not abused by using the same merely for the purpose of obtaining information having no reference to any particular interest and to sell the information thus obtained as opportunity may offer.

To guard against such abuse, rules have been adopted for the guidance of those officers and they have been instructed to permit access to such records "only upon application in each particular instance" in order to determine whether the inspection and copying of any particular record will interfere with the dispatch of the public business (33 L. D., 267).

The extent to which such examination will be allowed must be determined by the exercise of a sound discretion on the part of the officers in charge of the records and that discretion should not be controlled except where there is an abuse of it and the rights of an individual is denied, which does not appear in this case.

Your decision is affirmed.

CONTEST—NOTICE—HEIRS.

JENNEJOHN v. BLAKE.

Where one of several heirs of a deceased contestant makes entry, in the exercise of the preference right, for and in behalf of all the heirs, a contest against such entry must make all the heirs parties and notice thereof must be served upon each and all of them.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 26, 1909.* (J. F. T.)

April 27, 1906, "Mary E. Blake, one of the heirs and for the heirs of Julia M. Stearns, deceased," made homestead entry number 34256 for the SE. $\frac{1}{4}$, Sec. 14, T. 147 N., R. 28 E., Bismarck, North Dakota, land district. With her homestead application she filed her affidavit, which is as follows:

Mary E. Blake, formerly Mary E. Stearns, one of the heirs and daughter of Julia M. Stearns now deceased, being first duly sworn deposes and says that she is the daughter and legal heir of said deceased Julia M. Stearns; that said deceased Julia M. Stearns did file contest against homestead entry No. 15263 covering said described tract which was pending at the U. S. Interior Department, Washington, D. C., at the time said contestant departed this

life; further that said deceased was a qualified entrywoman at the time of her death and filed said contest against said entry in good faith and with the firm intention of filing her homestead right upon the tract of land covered by said entry; further that said Julia M. Stearns died November 8th, 1905, at Underwood, N. D.; that she was a native-born citizen of the United States and a widow, and had frequently passed over said SE. $\frac{1}{4}$ of Sec. 14, T. 147, R. 82, and was well acquainted with each and every subdivision thereof.

Affiant further states that she has received notice from the U. S. Land Office at Bismarck, N. D., that the contest above referred to had been decided in the favor of deceased contestant, and that H. E. No. 21146 was canceled and that thirty days would be given the heirs of said Julia M. Stearns deceased, in which to make entry for the SE. $\frac{1}{4}$ of Sec. 14, Tp. 147, R. 82, and this affiant now desires to file upon said land for the heirs of said Julia M. Stearns, deceased, as provided under the amendatory act of July 26, 1892 (27 Stat., 270), and now offers entry for same in accordance thereto.

April 15, 1908, George H. Jennejohn presented his affidavit of contest against said entry, charging that:

Mary E. Blake has never established her *bona fide* residence on said land; and that the said Julia A. Stearns, deceased, through and under whom she claims the right of entry, never established her residence thereon; that the only building on said land is a single board shack and is not fit for habitation; that there is no furniture or equipment for housekeeping of any nature in said building; that claimant is maintaining a home away from said land; that said default now exists.

On the same date the local officers rejected the same "because said affidavit does not show whom the defendant's heirs are, and make them party thereof."

Upon appeal to your office you held the contest affidavit sufficient, saying:

As defendant was permitted to make entry, as a representative of the heirs of a deceased contestant, who had been awarded a preference right of entry, I see no reason why the other heirs, if any, should be made parties defendant in this action. The presumption is that the defendant made the entry in question, as she says she did, as a representative of the heirs of deceased, and if she did, she is the proper party to make defense.

The contestee has appealed to the Department. Upon this appeal a brief is filed in behalf of the contestee and a second brief by different attorneys "for heirs other than Mrs. Blake." No departmental decision directly in point has been cited.

If this entry had been made by Mary E. Blake, *sole* heir of Julia M. Stearns, deceased, your ruling would be correct, as said Blake would then be the only person in interest, but as the entry was made each other heir, being shown by the record to be brothers and sisters of Mary E. Blake, has equal right and interest with her in connection with said entry. The contest affidavit must, therefore, be against each and all of said heirs and each and all of them must be defendants and have due and legal notice and opportunity to protest each his or her own rights and interests, which are clearly defined in the cases

of Biggs v. Fisher (33 L. D., 465) and Becker v. Bjerke (36 L. D., 26).

It follows that the contest affidavit under consideration stated no cause of contest against this entry as the same appeared of record, and said contest will stand dismissed as of date April 15, 1908, the date same was properly dismissed by the local officers.

Your decision is reversed.

CONTEST—NOTICE—JURISDICTION—PRACTICE.

JOHNSON v. BAKEMAN.

The failure of the notary public to attach his seal to the jurat to the affidavit filed as the basis for the service of notice of a contest by publication, upon which affidavit publication was made, was a mere clerical error, subject to correction at any time, and did not deprive the local officers of jurisdiction to proceed with the contest.

Where after the conclusion of testimony on behalf of contestant the contest is, on motion, dismissed for want of jurisdiction, without any evidence having been submitted on behalf of the entryman, but is subsequently reinstated without notice to the entryman, no action affecting the entry should be taken in the contest proceeding without affording the entryman an opportunity to submit testimony in his behalf.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 26, 1909.* (J. E. W.)

William L. Bakeman has appealed from your office decision of January 8, 1909, affirming the decision of the local officers and holding for cancellation his homestead entry, No. 44854, made May 13, 1907, for the SW. $\frac{1}{4}$, Sec. 25, T. 152 N., R. 83 W., Minot land district, North Dakota.

This action resulted from a contest initiated November 30, 1907, by Andrew Johnson, just a little over six months after said entry was made, charging abandonment. Service was by publication, and the parties were cited to appear before the local officers February 5, 1908. Contestant appeared and submitted testimony. Defendant failed to appear at the time the testimony was taken, but later in the day appeared specially by his attorney and filed a motion to dismiss the case for want of jurisdiction, for the reason that the notary before whom the affidavit for service by publication was made had failed to attach his seal to the jurat.

April 24, 1908, the contest was dismissed for want of jurisdiction. It does not appear that contestant had any notice of the alleged defect in the affidavit until notice of the decision of the local officers.

May 15, 1908, contestant filed a duplicate of the original affidavit, asking for service by publication, properly sworn to before the same

notary, and asked that the same be substituted for the defective affidavit.

Apparently without notice to the contestee the case was reinstated and thereupon the local officers denied the motion to dismiss, and recommended that the entry be canceled.

Upon consideration of the appeal of the contestee from the action of the local officers, you held that the only defect in the affidavit for service by publication was the failure of the notary to attach his seal, and this omission being a clerical error could be corrected at any time, and that when the new or substituted affidavit, with the notarial seal attached, was filed the clerical error was cured. You further held that from the testimony it was apparent claimant had failed to comply with the homestead law as to residence, cultivation, and improvement.

The appeal to the Department contends that after accepting the perfected affidavit, you erred in not ordering the case back for rehearing, in order that the contestee might have an opportunity to offer testimony.

It appears that appellant, relying upon the alleged defect in the affidavit referred to, did not attempt to offer any defense, and that the local officers sustained his contention as to the defect, and later without any notice to him of their proposed action, reinstated the contest and held the entry for cancellation without affording him a reasonable opportunity to offer testimony.

The Department concurs in your opinion that the omission of the notarial seal from the affidavit made the basis for service by publication was a mere clerical error and did not deprive the local officers of jurisdiction. However, under the circumstances, the Department is unwilling to order the cancellation of Bakeman's entry upon the *ex parte* showing of the contestant. The case is therefore remanded, with directions to the register and receiver to set a new day for hearing, at which the entryman will be permitted to make such defense as he may desire, after which contestant will be heard in rebuttal, and upon the entire record the case will be readjudicated.

With this modification your decision appealed from is affirmed.

NORTHERN PACIFIC ADJUSTMENT—TIMBER AND STONE CLAIM—ACTS
OF JULY 1, 1898, AND MAY 17, 1906.

ALLYN *v.* NORTHERN PACIFIC RY. CO.

Where prior to May 31, 1905, a timber and stone applicant submitted satisfactory proof and tendered the proper fees and purchase price, but upon which entry was withheld, not on account of any defect in the proof, but solely to await investigation by a special agent under general instructions

with respect to timber and stone proofs in cases where the witnesses were not cross-examined by special agent, the claim of the applicant will be regarded as an entry within the purview of the act of July 1, 1898, as extended by the act of May 17, 1906, and as subject to adjustment under the provisions of said acts.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 26, 1909.* (S. W. W.)

Rufus C. Allyn has appealed from your office decision of September 24, 1908, refusing to adjust his claim under the timber and stone law for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 31, T. 6 N., R. 18 E., Vancouver, Washington, land district.

It appears that the said tract is within the primary limits of the grant to the Northern Pacific Railway Company, on account of its branch line from Tacoma to Ainsworth, and opposite that portion which was definitely located June 29, 1883. Said tract is also within the limits of the grant to said company on account of the main line from Portland to Wallula, which was not constructed, and the grant in support of which was declared forfeited by the act of September 29, 1890 (26 Stat., 496).

The lands in question were listed by the company August 25, 1887, per list No. 13, which was cancelled July 10, 1893, and reinstated April 10, 1906. June 16, 1906, the tract books in your office showing no application for said land, a patent was issued to the railway company therefor, per clear list No. 150.

In the meantime, however, on November 2, 1902, Allyn made timber and stone application No. 3002, for said tract, and after publication of notice, submitted proof thereon February 23, 1903. The claimant and his witnesses not having been cross-examined by a special agent of your office, the proof was transmitted by the local office without the issuance of final papers, to await the investigation of a special agent, under general instructions contained in your office letter "P" of September 6, 1902, and the draft for \$410 tendered in payment by Allyn was refused at that time and returned.

Your office, on February 13, 1905, informed the local office that upon investigation by a special agent, no reason appeared why cash certificate should not issue to Allyn on his timber and stone purchase, and the proof was returned with instructions to that effect.

It seems that by letter dated September 24, 1905, the local office informed Allyn that his application had been approved, and that upon the remittance of \$410 within thirty days, final receipt would issue. It does not appear when this letter was received by Allyn, or, indeed, whether it was ever received; but it is shown that the money was deposited November 19, 1906, and on June 12, 1907, the receiver issued receipt No. 7807.

Your office decision holds that as the money was not actually paid to and accepted by the local office prior to May 31, 1905, the date mentioned in the act of May 17, 1906 (34 Stat., 197), extending the act of July 1, 1898 (30 Stat., 597, 620), the case seemed to come within the ruling in the case of *Jones v. Northern Pacific Railway Co.* (34 L. D., 105), and that it therefore was not subject to adjustment under the said acts of 1898 and 1906.

The act of May 17, 1906, *supra*, extending the provisions of the act of July 1, 1898, provided that the said provisions should be extended to include any *bona fide* settlement or entry made subsequent to January 1, 1898, and prior to May 31, 1905; and because Allyn's timber and stone application had not actually ripened into an entry, your decision holds that he was not entitled to the benefits of the said act.

It will be observed that, after presenting his timber and stone application, Allyn published the notice required by law, made the necessary proof and tendered the purchase price, including the fees. His purchase money was refused by the local office, not because of any defects in his proof, but merely because, under a ruling which had been recently made by your office, special agents were instructed to cross-examine all applicants and their witnesses in timber and stone cases.

As shown from the statement of the case, it does not appear whether Allyn received the notice that was sent him in February, 1905, informing him that his proof had been considered by your office after his case had been investigated by a special agent and found satisfactory; but, so far as the record discloses, as soon as Allyn was notified that his proof was satisfactory, he tendered anew the purchase money. It will thus be seen that, prior to May 31, 1905, the date specified in the act of 1906, *supra*, Allyn had done everything that he could in order to enter the land; and it was through no fault of his that his entry had not been allowed. The Supreme Court of the United States, in the case of *Wirth v. Branson*, 98 U. S., 118, says:

The rule is well settled by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract, is to be regarded as the equitable owner thereof.

See also *Lytle et al. v. State of Arkansas et al.*, 9 Howard, 314.

It is believed that the circumstances in this case clearly distinguish it from the case of *Jones v. Northern Pacific Railway Co.*, relied on in your office decision, where the applicant had not performed all the acts required of him. The Department is not disposed to overrule in any manner former decisions holding that a mere applicant is not entitled to the benefits of the act of 1898; but in this case it is believed

that Allyn's claim is entitled to the status of an entry, within the meaning of the said act of 1898, as extended by the act of 1906; and your office decision must be reversed.

You will therefore request the railway company to reconvey the land; and upon that being done, the timber and stone purchase of Allyn should be patented.

WILLIAM E. MOSES.

Motion for review of departmental decision of October 16, 1908, 37 L. D., 194, denied by First Assistant Secretary Pierce, April 27, 1909.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT—PRESUMPTIONS
ARISING FROM POSSESSION.

S. I. JONES.

While a full and clear showing will be required as to how, when, and upon what consideration the first stranger claimant of a military bounty land warrant acquired title thereto from the warrantee, his widow, or heirs, as to subsequent transfers reasonable presumptions may be indulged in favor of title by possession of the warrant for a long-continued period, where lapse of time has made the production of positive proof as to the manner and circumstances under which it was acquired practically impossible, unless there are circumstances tending to discredit or cast suspicion upon the title of such holder.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 27, 1909.* (E. F. B.)

This appeal is from the decision of your office of March 29, 1909, holding for cancellation location made by S. I. Jones, of N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 5, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, T. 6 S., R. 9 E., Gainesville, Florida, with military bounty land warrant No. 40121—160—1855, issued to John Metzger, private Ohio militia, war of 1812.

This warrant was assigned in blank in 1857, by Benjamin Metzger, Barbara Metzger and Salome Shoch, children and heirs of the warrantee. Also by Joseph Smith, Christian Smith, A. Metzger, Elizabeth Metzger, Elizabeth Lake, Eli Lake, Isaac Dresbach, Catherine Dresbach, Henry Gruber and Leah Gruber, and acknowledged in the presence of a Justice of the Peace. There is also an affidavit attached to said warrant made by a witness who states that the persons who executed said assignments "are the only children and heirs at law of John Metzger deceased, to whom the annexed land warrant No. 40121, was issued."

That affidavit has properly been accepted by your office as sufficient evidence of the death of the warrantee and of the identity of the assignors as the sole surviving heirs of the warrantee, but you required the locator to submit satisfactory affidavit that the warrant was actually delivered for value by the only heirs of the warrantee to Eliza J. Bulger, who subsequently assigned the same, under and by virtue of said blank assignment.

Responding thereto, the locator submitted the affidavit of Eliza J. Bulger, who states that she came into possession of the warrant as heir of her father, Oehmig Bird, who died January 21, 1878, said warrant being found among his papers at the time of his death, and became the property of affiant; that she has had undisputed possession of the same from that time to the time of the assignment of said warrant by affiant to Edwin W. Spalding in February, 1905, and during that time no person ever claimed ownership of the same. She further stated that her father had numerous business transactions and, according to her best knowledge and belief, became the owner of said warrant some time prior to his death, but she "has no knowledge of the exact time or the exact circumstances under which her father became owner of the warrant."

Two facts are established with sufficient certainty, to-wit: First, that the warrant was assigned in blank by the heirs of Metzger, the warrantee, which conveyed a good title to whomsoever it was delivered, who could also convey the right and title thus acquired to others by mere delivery. Second, that in 1878, nineteen years after the assignment of the warrant, it was found among the effects of Oehmig Bird at the time of his death, when it was taken possession of by his daughter, Eliza J. Bulger, as heir of her father, who assigned it to Edwin W. Spalding, under whom the locator claims.

Bounty land warrants are made assignable by express legislative authority by deed or instrument in writing, executed according to such forms as your office may prescribe. Being the bounty of the government, it was competent for Congress to fix the terms and conditions upon which it may be assigned. (Homer Guerry, 35 L. D., 310.) "The government itself is concerned and interested in knowing that the object of its bounty received the benefit intended to be conferred, and to be advised of facts enabling it to show that it discharged its obligation to him." (Ibid, 314.) Hence the purpose in requiring full proof how, when and upon what consideration the first stranger claimant acquired his title is for the purpose of satisfying the government that the warrantee or his heirs have received the benefit of the bounty, and released the warrant from all the conditions that attached to it in the hands of the warrantees. But there is no valid reason why the same strictness of proof should be required as to subsequent transfers of the warrant. (Thomas N. Lad-

nier, 35 L. D., 630.) Reasonable presumptions may be indulged in favor of a title by possession of the warrant for a long period, where lapse of time has made the production of positive proof as to the manner and circumstances under which it was acquired practically impossible, unless there are circumstances tending to discredit or cast suspicion upon the title of such holder.

It is proper that full and clear proof should be required showing that the warrantee or his widow or heirs have parted with their title, but as to subsequent transfers, the sound discretion and judgment of the executive officer must, in a great measure, be controlled by surrounding circumstances.

From the long-continued possession of the warrant by Bird, it may reasonably be presumed that he came into possession of it by delivery from the heirs of Metzger under their assignment either directly or by delivery from their immediate assignee, there being no circumstance or facts shown by the record to rebut or weaken such presumption.

While the affidavit of Mrs. Bulger, now with the record, does not show specifically that she was entitled to the warrant as the only heir of her father, Oehmig Bird, yet as the appeal states this to be a fact, and as she swears that it came into her possession as heir and her continued undisputed possession of the same for thirty years, it is believed that the warrant might be passed if her affidavit covering the statement made in the appeal be furnished.

The record is herewith returned for further consideration and action in accordance with the holding herein made.

NORRIS *v.* NORTHERN PACIFIC RY. CO.

Motion for review of departmental decision of January 30, 1909, 37 L. D., 426, denied by First Assistant Secretary Pierce, April 27, 1909.

SCHOOL LAND-INDEMNITY SELECTION-ACT OF FEBRUARY 28, 1891.

STATE OF CALIFORNIA *v.* YOULES ET AL.

Where a State makes school indemnity selection of a quarter-section containing 160 acres as a whole, upon a base of another quarter-section assigned as a whole, and the base so assigned is defective in part, it must be held defective in toto; and such defective base can not be amended so as to defeat an intervening adverse claim.

An indemnity selection based upon lands lost to the school grant by reason of being within a forest reserve, made under the provisions of the act of

February 28, 1891, prior to the repeal of the act of June 4, 1897, can not be carried to completion under the provisions of the latter act after the repeal thereof, where the selection as made was not in accordance with the requirements of that act.

Lands to which the State does not have full legal title at the date of selections based thereon, do not constitute a valid base to support indemnity selections authorized by the act of February 28, 1891.

First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) *Land Office, April 28, 1909.* (S. W. W.)

The State of California has appealed from your office decision of September 12, 1908, rejecting in part its indemnity selections embraced in lists Nos. 4847 A, B, C, D, E, F, and G, and 4848 A, B, C, and D, aggregating 1280 acres of land in Secs. 19, 20, 21, 29, 31, and 32, T. 22 N., R. 14 E., M. D. M., Susanville land district, California.

It appears from the record and your said office decision that the lands involved, having been temporarily withdrawn for forestry purposes on December 24, 1902, were restored to settlement September 20, 1904, to be subject to entry, filing, and selection on January 31, 1905; that about 8 o'clock p. m., on January 30, 1905, the day before the lands became subject to selection, the State selections involved were received in the local land office through the mails; that about 3.30 o'clock, on January 30, 1905, the local office received four telegrams, dated at Beckwith, California, and signed by John H. Youles *et al.*, informing them that homestead settlement had been made on portions of the lands involved herein.

January 31, 1905, the day on which the lands became subject to entry and selection, none of the alleged homesteaders who had telegraphed the local office appeared to make entry, but one Thomas E. Driscoll appeared at 9 o'clock and made homestead application for 160 acres of land, 80 acres of which were in conflict with State selections embraced in 4847 E and G.

February 3, 1905, John H. Youles presented homestead application for 160 acres of land conflicting with the State selections in lists 4847 B and D as to 120 acres thereof, and on the same day John T. Youles made homestead application for 160 acres of land conflicting as to 120 acres with selections embraced in lists 4847 B and 4848 B, and on the same day Michael Shanick presented homestead application for 160 acres conflicting as to 120 acres thereof with the State selections in lists 4848 A.

February 23, 1905, Forest R. Young presented homestead application for 160 acres conflicting as to 120 acres thereof with the State selections in list 4848 A and 4847 A.

All of these applications were held by the local office pending action on the State selections, and on March 3, 1905, the register and

receiver advised the State surveyor-general of the conflicts with the applications numbered 4847 and called attention to the fact that the nonmineral affidavit describing the lands selected had been executed before one Thomas S. Burnes, a notary public in San Francisco, and that under the instructions of the Department affidavits purporting to be executed before such notary were not acceptable. They further advised the State official that while the SW. $\frac{1}{4}$ of Sec. 16, T. 46 N., R. 11 E., was assigned as base to support the selection embraced in application 4847 B, three forty-acre tracts in the same quarter-section were also assigned as base for the selection and application 4847 E, and that one forty-acre tract in that quarter-section was also assigned as part of the base for the selection in the list 4847 G, and, furthermore, that one forty-acre tract of the same quarter-section had been previously used as base for an indemnity selection No. 1122, filed in that office on October 29, 1903.

With reference to the State's application in list 4848 A to D, the local office on March 2, 1905, notified the State that Shanick claimed settlement on the NW. $\frac{1}{4}$ of Sec. 20, T. 22 N., R. 14 E., conflicting, as above stated, with the State selection as to 120 acres. The local officers accordingly advised the State surveyor-general that the homesteaders who alleged settlement were entitled to preference over the State's claim and that in so far as any conflicts with such settlers were concerned, the State's claim must be rejected.

March 11, 1905, the State replied that a clerical error was made in the description of the lands offered as bases to support the selection in list 4847 and that new lists were being prepared to be substituted for the old, and in the same letter the State surveyor-general advised the local office that he was also preparing an appeal from his decision regarding the conflicts between the State's claim and the alleged settlers and he forwarded amendatory selections to take the place of those in which the bases had been duplicated, as above shown. March 8, 1905, the local office informed the surveyor-general that the filing of a new list was deemed to be a waiver of any rights of appeal from the action of March 3, 1905, regarding the selections in list 4847; and said list was accordingly rejected as to the lands in conflict. On the same day John H. Youles was notified that upon the receipt of the proper fees and commissions his homestead application would be allowed and the homestead application of Thomas E. Driscoll was rejected. Both Driscoll and the State appealed to your office, whereupon your decision of September, 1908, *supra*, was rendered.

From your said decision it appears that in addition to the applications mentioned, one Isaac G. Bobo, on September 21, 1905, presented timber and stone application for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 21, T. 22 N.,

R. 14 E.; that Jared Bates presented timber and stone application for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said Sec. 21, and that Joseph Riley, on February 26, 1907, presented timber and stone application for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 20, in said township, all of which conflicted with selections embraced in State list No. 4848. Your office decision found that the State applications, having reached the local office through the mails after office hours, on January 30, 1905, were officially presented at 9 o'clock on the day following, and that having been received in this manner they were entitled to consideration as offered on that date after all the claims of those presented at 9 o'clock in the morning had been received, citing 27 L. D., 113, and 32 L. D., 648; that the State's application 4847 B, based on the SW. $\frac{1}{4}$ of Sec. 16, T. 46 N., R. 11 E., was invalid in toto owing to the fact that a portion of the base, namely, the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, had been previously used by the State, and the base being bad in part was considered to be bad in whole, and for the same reason the selection in list 4847 E, based upon the same subdivision, was also invalid.

Your office decision further found that all the selections embraced in the State's application 4848 A to D, were invalid for the reason that said selections were based upon Sec. 36, T. 45, N., R. 10 W., and the certificate from the county recorder showed that the land was sold for taxes on June 22, 1892. Inasmuch as the land was shown to have been bought by the State for taxes, your office held that there must necessarily have been a prior sale of the same by the State and that a selection could not be based upon a tract of land which had once been sold by the State, notwithstanding the State may have subsequently acquired the land again under a tax sale; that the exchange of lands contemplated by the act of February 28, 1891 (26 Stat., 796), does not contemplate an exchange of any lands other than those sections 16 and 36 the State's title to which has not been incumbered in any manner.

Your office decision concluded that the homestead applications presented in February, 1905, and which contained no allegation showing settlement on a prior date, must yield to those of the State's selections which were presented on January 31, 1905, and in support of which valid bases were assigned; but that such homestead applications were superior to those selections for which no valid bases were assigned prior to the filing of the homestead claims; and, for the same reason, that the timber and stone applications of Isaac G. Bobo, Jared Bates, and Joseph Riley were superior to the State's selections embraced in list 4848, such selections having been based upon a school section which the record indicated had been previously sold by the State.

Respecting the action of the local office rejecting the homestead application of Thomas E. Driscoll, your office decision held that the

reason assigned by the local office, namely, that the applicant was a saloon keeper in Susanville and never saw the land and probably never heard of it until the morning on which his application was presented, was not sufficient to justify the rejection of such application; that the nonmineral affidavit filed in support of the homestead claim contained a statement to the effect that the applicant was blind and had secured the services of a professional cruiser to examine the land for him; that the law did not exact physical impossibilities of applicants for public land and did not intend to discriminate against the afflicted. Accordingly, the action of the local office rejecting Driscoll's application, was reversed.

In its appeal to the Department the State assigned error in your decision in holding that all the selections embraced in application No. 4848 A to D were invalid for the reason that the selections were based upon a school section which had been sold by the State and subsequently re-acquired under a tax sale, and in holding that the application No. 4847 B was invalid in whole by reason of the fact that one forty-acre tract of the quarter-section assigned in support of that selection had been previously used as base.

It is urged in the argument submitted in support of the appeal that at the time of the tender of the selection in question the act of June 4, 1897 (30 Stat., 36), was in force; that said act was not repealed until March 3, 1905, nearly two months after the application of the State was presented, and that whether the State was entitled to make the selection under the act of 1891, *supra*, is not material because such selection, it is claimed, might clearly have been made under the act of 1897.

It is urged in support of the appeal from that portion of your office decision rejecting the selections in list 4847 because a part of the base was bad that the decision cited by your office in support of its conclusion, namely, 15 L. D., 55, should not be applied to this case because in the case cited there had been a selection of a legal subdivision in support of several fractional losses, while in the case under consideration there was a selection of a quarter-section in lieu of another quarter-section three-fourths of which constituted valid base.

The regulations of July 29, 1887, cited with approval by the Department in the case of Melvin *et al.* v. the State of California (6 L. D., 702), provided that:

Hereafter on presentation of applications to select school indemnity it will be insisted on that the areas of the selected tracts and their bases must be equal, and the selections must be separate and distinct so that action thereon may be taken separately.

Inasmuch as a quarter-section containing 160 acres was selected as a whole upon the base of another quarter-section assigned as a whole,

and as the base so assigned was defective in part, it necessarily follows that under the rules above mentioned it was defective in toto and such defective base may not be amended so as to defeat an intervening adverse claim. See *Derrick v. State of California* (27 L. D., 644).

Respecting the State's contention that the selection may be approved under the provisions of the act of June 4, 1897, *supra*, it may be sufficient to say that the selection was not proffered under that act and may not now be considered thereunder because the law has been repealed. Moreover, in cases of relinquishments made in pursuance of said act the regulations required that such relinquishments should be executed, acknowledged, and recorded in the same manner as conveyances of real property are required to be executed, acknowledged, and recorded by the laws of the State or Territory in which the land is situated. See regulations of December 18, 1899 (29 L. D., 391).

Accompanying the appeal, however, is a certified transcript of proceedings had in the superior court in and for the county of Modoc, State of California, from which it appears that the State had sold Sec. 36, T. 45 N., R. 10 E., assigned as bases to support the selections embraced in list 4848 here involved, on or about the tenth day of May, 1889, to one Denis Nugent; that said Nugent had failed to pay all of the purchase price and the State initiated the said proceedings against him for the purpose of recovering title to the said land; that no defense was made by Nugent to the proceedings initiated by the State and on January 30, 1899, a judgment and decree of foreclosure was rendered, whereby the defendant was foreclosed of all claim, right, title, and interest in and to the said land and the certificate of purchase which had been issued by the State was annulled, vacated, and set aside. This evidence was not in the record at the time your office decision was rendered.

It appears from certificate of the county auditor, issued June 2, 1905, from which your office found that the State had sold the land, that the tax deed in favor of the State was dated May 10, 1905, and that subsequently to the date of the sale to the State, in pursuance of which the State received the deed, all the delinquent taxes, penalties, and costs which had accrued upon said lands were paid into the county treasury by one J. W. Fitzpatrick, on June 2, 1905.

Section 3788 of the Political Code of the State of California provides that:

When State lands upon which the full purchase price of one dollar and twenty-five cents per acre has not been paid, and the deed therefor to the State provided for in section thirty-seven hundred and eighty-five has been forwarded to and filed with the surveyor-general, the said lands shall again become subject to entry and sale in the same manner and subject to the same conditions as apply to other State lands of like character, except that the former possessors of the lands thus deeded to the State, their heirs or assigns, shall be preferred

purchasers thereof for the period of six months after the deeds are filed with the surveyor-general; but the surveyor-general shall not permit an entry or make a sale of any lands thus deeded to the State except upon the previous payment into the State treasury as other moneys are required to be paid therein, in addition to the price of said lands as compared with the price fixed for other State lands of like character, by the person or persons proposing to make the entry or purchase, of a sum equal to the delinquent taxes, penalties, costs, and accruing costs by virtue whereof the State became a purchaser of the lands sought to be entered or purchased, and also all delinquent taxes, penalties, and costs which may have accrued upon such lands prior to and subsequently to the date of the sale to the State in pursuance of which the State received a deed therefor.

It will be seen from the foregoing that on January 31, 1905, the time of the presentation of the selection to the local office, the State had not even received the deed for these lands, as the certificate of the county recorder showed that the tax deed was issued on May 10, 1905. Moreover, in accordance with the provisions of section 3788 of the Political Code quoted above, the purchaser from the State has a preference right of six months from the date of filing of the deed with the surveyor-general to repurchase the land. From this it follows that at the time of the selection in question the legal title to the land was not in the State and such land therefore did not constitute valid bases in support of indemnity selections authorized by the act of February 28, 1891, *supra*.

The entire matter considered, your office decision is affirmed.

ALLOTMENTS TO INDIANS OR ESKIMO IN ALASKA—ACT OF MAY
17, 1906.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 29, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices in Alaska.

GENTLEMEN: The act of May 17, 1906 (34 Stat., 197), provides:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

2. Appropriate forms for the use of applicants under this act have been prepared and are herewith transmitted. [See forms on pages 438-440, 35 L. D.]

3. The application must be signed by the person applying, but need not be sworn to. If the signature is by mark, the same must be witnessed by two persons.

4. The affidavit must be sworn to by the person applying, and if claiming under the preference right clause the date of the beginning of his occupancy must be given, and its continuous nature stated. The corroborative affidavit must be signed by two witnesses, who may be Indians or Eskimos. The nonmineral affidavit must be signed by the person applying.

5. The affidavits may be sworn to before any officer authorized to administer oaths and having a seal. If the application is made by a woman, she must state in her affidavit whether she is single or married, and if married must show what constitutes her the head of a family, as it is only in exceptional cases that a married woman is entitled to an allotment under this act.

6. As soon as you have received an application for an allotment, you will at once notify the applicant in writing of its receipt and inform him that appropriate action will be taken thereon. All notices of this character should contain a copy of the description of the land involved, as given in the application.

7. You will number applications for allotments made under this act in accordance with the circular of June 10, 1908, and forward the same to this office at once, where they will receive immediate consideration. All such applications should be noted on the schedules and forwarded at the end of the month, as required by said circular, noting in the "Remarks" column the date of transmittal.

8. You will assist the applicants in any feasible manner, and as the act makes no provision for any fees for filing you will make no charge in any of these cases. The allotments, when found correct in form, and without valid adverse claims, will be placed on a schedule which will be submitted to the Department for approval, and thereafter, as no provision is made for issuing patents, the same will be kept on file in this office, and a certificate of the approval of the allotment will be issued by this office and transmitted to you for immediate delivery to the allottee.

9. As the act seems to intend that allotments may be made for unsurveyed lands you will require, in such cases, as accurate a description as possible, by metes and bounds and natural objects, of the lands applied for. The lines must be run, unless bounded by bodies of water of sufficient size to make the meandering of the same evidently necessary, north and south, and east and west.

10. Hereafter, you will require each person applying to enter or in any manner acquire title to any lands in your district, under any law of the United States, and each person who applies for the right to cut timber to file a corroborated affidavit to the fact that none of the lands covered by his application are embraced in any pending application for an allotment under this act, or in any approved allotment, and that no part of such lands is in the *bona fide* legal possession of or occupied by any Indian or Eskimo.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

BOUNTY LAND WARRANT AND SCRIP LOCATIONS—SEC. 13, ACT OF
MAY 29, 1908.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 30, 1909.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: The instructions of June 9, 1908 (36 L. D., 501), are hereby amended to read as follows:

Your attention is called to section 12 of the act of May 29, 1908 (35 Stat., 465), which provides:

That all patents heretofore issued on applications made for title to public lands between June fifth, nineteen hundred and one, and June twentieth, nineteen hundred and seven, with either military bounty land warrants, agricultural college land scrip, or surveyor-general's certificates, be, and the same are hereby, declared valid; and that all such locations, where the applications to locate were made between June fifth, nineteen hundred and one, and June twentieth, nineteen hundred and seven, with either military bounty land warrants, agricultural college land scrip, or surveyor-general's certificates, and upon which patents have not been issued, but which may hereafter be approved for patent by the Department under the ruling in the case of Roy McDonald, December twenty-first, nineteen hundred and seven, are hereby declared legal, and the Commissioner of the General Land Office is hereby authorized and directed to issue patents on all such locations which may be approved by him for patent as above provided: *Provided*, That they are otherwise in accordance with the rules and regulations in such cases made and provided.

As the cases referred to in this provision of law are presumably all pending either in this office or in the Department, it is not deemed necessary to give you any instructions herein under said section. Attention, however, is called to the decisions of the Department of

January 31, 1907 (35 L. D., 399), and June 20, 1907 (35 L. D., 609), in the Lawrence W. Simpson case, and December 21, 1907 (36 L. D., 205), in the Roy McDonald case.

Under the rulings in such cases military bounty land warrants, agricultural college scrip, supreme court scrip, and certificates issued under the act of June 2, 1858 (11 Stat., 294), surveyor-general scrip, can not now be located upon public lands *outside of the State of Missouri* without previous entry, filing, or settlement, unless an application to locate was filed prior to June 20, 1907. Supreme court scrip and agricultural college scrip, however, may be used in payment for pre-emption claims and in commutation of homestead entries as heretofore. Military bounty land warrants and surveyor-general scrip may be used as heretofore in payment for pre-emption claims, in commutation of homestead entries, and in payment for lands entered under the desert land, timber culture, and timber and stone laws, and for lands that may be sold at public auction, except lands ceded by any Indian tribe, the proceeds of which are by law required to be paid to the Indian. See act of December 13, 1894 (28 Stat., 594).

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

CONFIRMATION—GENERAL ORDER FOR INVESTIGATION—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

GEORGE RILEA ET AL.

The order of March 26, 1903, directing the investigation of all entries within the former Siletz Indian Reservation, on the ground of supposed fraud in connection therewith, together with the subsequent actions by the land department with respect to such entries taken within the two-year period, are sufficient to bar the operation of the proviso to section 7 of the act of March 3, 1891.

Morgan v. Rowland; 37 L. D., 90, overruled.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, April 30, 1909.* (J. H. T.)

October 1, 1900, George Rilea made homestead entry, No. 13091, formerly Oregon City series, now 0811 Portland series, for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ and N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 10, T. 9 S., R. 10 W., W. M., upon which cash certificate No. 6441 issued November 4, 1901, said lands being within the former Siletz Indian Reservation.

Delay in this case is accounted for by the fact that the papers have been in use before a United States court in criminal proceeding for a long time, and were finally returned to your office September 24, 1908.

On April 10, 1907, Rilea filed relinquishment in the local land office, whereupon the entry was canceled, and Ernest M. Gooch applied to make entry for the lands.

Kolo Neis claiming as transferee from Rilea, protested against the allowance of the application of Gooch. Gooch's application was suspended, whereupon he appealed to your office.

On January 25, 1908, the said Kolo Neis filed in your office a motion to have the said entry of Rilea passed to patent, under the proviso to section 7 of the act of March 3, 1891. He filed therewith a written statement that he was the transferee of the entryman. On May 18, 1908, Neis renewed the motion and filed a certified copy of a deed from Rilea.

By your office decision of November 24, 1908, the entry of Rilea was reinstated, the application of Gooch rejected, and a hearing was ordered, under circular of November 25, 1907, upon an adverse report made by Special Agent Lafferty, dated December 5, 1905.

Neis has appealed from that part of your decision ordering the hearing, and makes the contention that patent should issue under the act above cited.

March 25, 1903, all the entries in the former Siletz Indian Reservation were suspended by your order, upon direction of the Secretary of the Interior that such entries be investigated, upon information of fraud in connection therewith.

March 26, 1903, you directed Special Agent George W. Patterson, at Oregon City, Oregon, to investigate all entries within the said former reservation. In your said letter you quoted from one of the letters of Mr. Brown, agency clerk, at the Yakima Indian Agency, which had been sent to the Secretary of the Interior, wherein he says:

My personal observation of these matters was in connection with the old Siletz Indian Reservation, in Lincoln County, Oregon. It is the practice there (in the majority of cases) for the entrymen to visit the land before filing, then to visit it once, sleeping one night upon it, every six months, then to return to his former work and home, and return to the land in another six months. Very rarely does the family or any member of it, save the father, come to the land; their household effects are not brought, and on completion of the title they never see the place again nor do anything to improve it.

You further stated in said direction to the special agent that the fact that most of the lands in the former Siletz Indian Reservation are not suitable for agricultural purposes indicates that there is considerable truth in Mr. Brown's statement, and that the entries in question are made solely for speculative purposes, without compliance with the law requiring residence and cultivation; that the Secretary directs that immediate attention be given to this matter and proper action be taken to prevent the alleged frauds; that the said agent is therefore instructed to make report upon all homestead

entries in townships 6, 7, 8, 9, and 10 south, ranges 9, 10, and 11 west, included in the said former reservation; that said agent should first take up those entries wherein commutation proof had been made.

August 7, 1903, you directed Special Agent Hobbs, at Oregon City, Oregon, to make investigation of all entries in the townships above designated, the former Special Agent Patterson having been transferred to other work. You referred Hobbs to your former letter directing Patterson to make the investigation.

August 19, 1903, the said Special Agent Hobbs made report to your office, received August 25, 1903, wherein he states:

That on the 17th of August he returned from a trip of investigation of entries in township 9 south, range 10 west, within the territory mentioned; that on arriving at Toledo, Oregon, which is the nearest railroad station to the land, he learned that, notwithstanding that all the lands (except a few fern and brush covered hills) in the locality which he wished to examine had been filed upon, not one out of twenty of the claimants resided upon their respective homesteads; that the lands were heavily timbered, with a dense undergrowth of ferns, vines, and brush, and that no person who is not familiar with the country and the location of the various claims could make any progress, without the assistance of a competent guide, with the examination of the entries; that he drove to what is known as "Canoe Landing" on the Siletz River, at which point the road by which further progress with a team and buggy ends. From there he carried out provisions and blankets into the forest about $1\frac{1}{2}$ miles, where he found an old cabin without a floor, with a clapboard door, and that a few square rods surrounding the house had been cleared of underbrush; that from this point he hunted up fourteen claims, not one of which could be reached by any means except on foot, and only in that way by climbing over logs and steep mountain sides, in many places he had to cut his way through the dense undergrowth; that in all the claims thus investigated he did not see a cow, horse, hog, or any stock of any kind, nor was there a house on any of the claims (save one) that showed any evidence whatever of recent habitation; that it appeared from what he did see and reliable information from other sources that all or practically all of the level and nontimbered land fit for agricultural purposes in the original Siletz Indian Reservation is covered by Indian allotments; that all of the lands he had examined upon which homestead filings had been made are so heavily timbered that the cost of clearing a sufficient number of acres to make a living upon would entail an expenditure which would be out of the reach of any man of ordinary means and the further fact that not to exceed one-tenth of the land, if cleared, is level enough for farming purposes was, in itself, evidence that the lands have, in a general way been taken up for the timber thereon and not for homes; that almost all of the lands in said reservation had been filed upon, but that there are no roads by which claimants could be reached, either with a team or saddle horse, there being only a few dim foot trails which are only used semiannually by the claimants in going to and from their respective entries prior to making final proof but, except in few instances, never afterward.

November 4, 1903, said Special Agent Hobbs telegraphed your office requesting that no patents be issued for lands within the said former reservation.

November 9, 1903, Hobbs made a written report to your office, sending a list of 23 cases, among them the entry of Rilea. In said report he stated:

That the entrymen had mortgaged their claims to one Willard N. Jones; that he had reliable information that said entrymen were in collusion with Jones in acquiring title to said lands; that the records of the local land office at Oregon City show that six of the entries mentioned in the list had been patented and that the patents were delivered to said Jones; that in view of this fact it appeared evident that there was an understanding between the claimants and Jones by which said Jones was to become the owner of all the lands belonging to the said entrymen; that he also had further reliable information that very few, if any, of the claimants named ever complied with the requirements of the homestead law in the matter of residence, cultivation, or improvements. He accordingly recommended that no further entries in the said list be patented pending a further investigation of the same.

With the said adverse report of December 5, 1905, by Special Agent Lafferty, he transmitted an affidavit executed by George Rilea, the claimant, under date of March 9, 1905. Therein Rilea stated substantially as follows:

That in the fall of 1900, about September, he was approached by John L. Wells, a real estate dealer, of Portland, Oregon, and also an old soldier, who asked him if he had ever used his homestead right; that he replied he had not, whereupon Wells stated that he could put Rilea onto a scheme to get a piece of land whereby he could make a couple of hundred dollars; that he replied that he did not have the money to pay the expenses of filing and making proof on a homestead, whereupon Wells stated he would introduce Rilea to a man who would arrange to get the money to pay all expenses required to perfect title; that he was thereupon introduced to W. N. Jones and Thad S. Potter; that the matter was explained to him, and under this agreement Rilea was to sign a note and mortgage for the sum of \$720 when final proof was made; that it would cost about \$520 to perfect title, which would leave a net profit of \$200 to the entryman; that he made the filing in accordance with said agreement and that in a short time after filing he made a trip to Siletz Indian Reservation, where he was told the claims were located; that he with a party went in wagons to the Siletz River to what is known as "Canoe Landing" and camped there one night and the next morning some of the parties whose claims were up away from the river went with Thad Potter, and those whose claims were down the river went in a boat; that he was one of the party that was led by John L. Wells; that they went down the river about a mile and Wells suggested it was not worth while to go any farther and they returned to camp; that the next visit to the claim was made the next spring, in March, 1901, which he made in company with John L. Wells and others, all old soldiers; that on that visit he stayed around the claim a day or two and returned to Portland, the expenses of this trip being paid by the said Potter; that the last trip he made to his claim was in the fall of 1901, in September or October, in company with some of the soldiers; that on this visit they stayed several days; that he had his gun with him and hunted some; that when they returned to Portland they all went to the Oregon City land office and made final proof, some of them acting as witnesses for each other; that the said J. L. Wells was one of his witnesses and Wells told claimant to answer the questions about as he did, that it did

not make much difference, as it was only a form; that on the same afternoon after making proof he went to the office of the said W. N. Jones and Thad S. Potter and made out the mortgage and note and signed them; the consideration was \$720, to run six months, without interest; that Jones at that time paid him \$200; that during the next two or three months he met Robert Montague, who said that he wanted to buy up some of the old soldiers' claims, and that he would give \$200 more than Jones would give, and asked Rilea to see the old soldiers and find out how many he could get to sell their claims, and he agreed to give Rilea a rake off; that he accordingly saw several of the soldiers and several of them sold their claims to Montague.

In the case of the Menasha Wooden Ware Co., assignee of William Gribble, wherein decision was rendered November 30, 1908, by the Supreme Court of the District of Columbia, published in 37 L. D., 329, the question of "protest" under the said act was considered. In said case the Commissioner of the General Land Office had ordered an investigation of the claim of Gribble among others, and had instructed a special agent to carry it on. No formal or specific charges were made and the investigation was ordered by reason of the fact that in several of the claims the same witnesses had been used. To the Commissioner this appeared suspicious of fraud and to call for an inquiry into the facts. The Commissioner had also instructed the special agent charged with the investigation to cross-examine the claimant and his witnesses and to make a prompt report thereon. It thus appeared that the Department was actively engaged in the investigation of the facts concerning the validity of the claim under a declaration of doubt and suspicion touching its good faith. The court in the said decision used the following language:

The question then is whether this constituted a contest or a protest. It was not a *contest* in the sense that a special charge had been made, much less that notice thereof had been given to the claimant, so that it might be met by him. Neither was it a *protest* in the sense that a specific ground had been pointed out for the basis of the protest and the claimant informed thereof. But are either of these necessary? There was a solemn declaration by the department that the circumstances surrounding the claim were such as to beget suspicion and to call for a thorough investigation and that in the meantime the patent ought not to be granted. The very purpose of the investigation might be defeated if the claimant must be notified in advance. The investigation resulted, after June 10, 1903, in a report upon which there was a formal suspension of the patent and the case is still under consideration and undetermined for want of knowledge on the part of the department of the whereabouts of the claimant who should be served with notice.

As defined by Webster, a protest is "a solemn declaration of opinion, commonly a formal declaration against some act." Is not that exactly what this is? It was the first step in a proceeding calculated to test the validity of the claimant's right to a patent. That step having been taken within the two years the statute of confirmation did not operate upon this claim.

In view of the above language, it clearly appears that it is not necessary in order to prevent the running of the statute that a specific charge be made against an entry or that an entry be listed for investi-

gation as held by the Department in 37 L. D., 90. The original order of March 25, 1903, based upon information of fraud as to entries in these particular townships, suspended all final entries within a certain area, the townships named.

The order of March 26, 1903, directed a special agent to examine all commuted homestead entries within certain townships designated, including township 9 south, range 10 west, which embraced the entry now under consideration. Your order of August 7, 1903, likewise directed investigation of all entries within said township and others.

The report of Special Agent Hobbs, dated August 19, 1903, received in your office August 25, 1903, recited that he had investigated entries in township 9 south, range 10 west, which includes this entry. He makes it clear that all of the entries were fraudulent. After still further investigation the said Special Agent Hobbs telegraphed your office, November 4, 1903, requesting that no patents be issued on homestead entries in said former reservation. This all took place within the two-year period. The above telegram was followed by a written report, dated November 9, 1903, wherein Hobbs presents formal charges against 23 specific entries, among them the entry of Rilea. This latter report is more specific than the former report or the telegram but simply confirms the former protests and furnishes additional identification. However, this entry was, prior thereto, sufficiently identified as being under protest. It was as effectually identified by being one of "all commuted entries" within the townships named, as by being listed. In fact, it was embraced in a list or abstract of commuted entries transmitted with the monthly returns from the local office for the month of November, 1901, as the practice required, and a duplicate retained in the local land office.

The order directing investigation of all commuted entries, and others in certain townships, presupposed examination by the special agent of these lists or abstracts in the local office, as general orders and the practice required, whenever needed to learn the names and addresses of claimants. It would have been unnecessary to prepare another list, as the agent had access to the records of the local office, the place of his headquarters.

Rilea says he sold to Montague, and details the steps which led up to the sale. This statement of Rilea seems to show that Montague was thoroughly familiar with all of the circumstances surrounding the entry. The copy of the deed furnished shows a purported sale to Neis, but Montague appears as one of the witnesses to the signature to the deed, and also took acknowledgment of same as notary public. The circumstances indicate that if the sale was in fact made to and for the benefit of Neis it was done through Montague and Neis probably knew all of the facts in connection with the matter.

No more flagrant violations and evasions of law have been brought to the attention of the Department than have been shown in connection with entries in said former reservation, embracing the townships designated. It was upon information of violations of this nature, affecting this entire body of land, that suspension and investigation of the entire area was ordered. The orders included every existing entry in the said area. They were all protested and within the two-year period.

The fact that many of the entries have been erroneously passed to patent upon the theory that the two-year period, as provided by section 7 of the act of March 3, 1891, had run, will not preclude the Department from now taking proper action as to those entries not patented.

It will be seen that every order and report above mentioned, in terms necessarily include this entry.

There can be no doubt that the entryman, if he had been given notice of said orders, would have known that his entry was under protest. However, notice is not essential. (33 L. D., 306, 498.) The sole question here is one of identity. I have no hesitancy in finding that this entry was sufficiently identified as one being under protest within the two-year period and that a hearing should be had upon the charges preferred. Accordingly, your decision is affirmed. You will cause the hearing to proceed as directed.

Existing instructions and decisions not in harmony with the above views will no longer be followed.

DESERT LANDS—SELECTIONS UNDER CAREY ACT.

REGULATIONS.

STATUTES.

Section 4 of the act of August 18, 1894, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1895, and for other purposes" (28 Stat., 372, 422), authorizes the Secretary of the Interior, with the approval of the President, to contract and agree to patent to the States of Washington, Oregon, California, Nevada, Idaho, Montana, Wyoming, Colorado, North Dakota, South Dakota, and Utah, or any other States, as provided in the act, in which may be found desert lands, not to exceed 1,000,000 acres of such lands to each State, under certain conditions.

The text of the act is as follows:

SEC. 4. That to aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to

actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State, to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert-land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury not otherwise appropriated one thousand dollars.

In the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1897, and for other purposes, approved June 11, 1896 (29 Stat., 413, 434), there is, under the head of appropriation for "Surveying public lands," the following provision:

That under any law heretofore or hereafter enacted by any State providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An act making appropriations for the sundry civil expenses of the Government for the fiscal year ending

June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

The limitation of time in the above-quoted section 4 was modified by section 3 of the act entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1902, and for other purposes," approved March 3, 1901 (31 Stat., 1133, 1188), which provides as follows:

SEC. 3. That section four of the act of August eighteenth, eighteen hundred and ninety-four, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," is hereby amended so that the ten years' period within which any State shall cause the lands applied for under said act to be irrigated and reclaimed, as provided in said section as amended by the act of June eleventh, eighteen hundred and ninety-six, shall begin to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if the State fails within said ten years to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period of not exceeding five years, or may, in his discretion, restore such lands to the public domain.

By the act of March 1, 1907 (34 Stat., 1057), the provisions of the foregoing acts were extended to the desert lands within the former Southern Ute Indian Reservation in Colorado.

Said act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section four of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and the acts amendatory thereof, approved June eleventh, eighteen hundred and ninety-six, and March third, nineteen hundred and one, respectively, be, and are hereby, extended over and shall apply to the desert lands included within the limits of the former Southern Ute Indian Reservation in Colorado not included in any forest reservation: *Provided*, That before a patent shall issue for any of the lands aforesaid under the terms of the said act approved August eighteenth, eighteen hundred and ninety-four, and amendments thereto, the State of Colorado shall pay into the Treasury of the United States the sum of one dollar and twenty-five cents per acre for the lands so patented, and the money so paid shall be subject to the provisions of section three of the act of June fif-

teenth, eighteen hundred and eighty, entitled "An act to accept and ratify the agreements submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriation for carrying out the same."

SEC. 2. That no lands shall be included in any tract to be segregated under the provisions of this act on which the United States Government has valuable improvements or which have been reserved for Indian schools or farm purposes.

In the act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1909, and for other purposes, approved May 27, 1908 (35 Stat., 317, 347), there is under the head of "Arid lands in Idaho and Wyoming," the following provision:

That an additional one million acres of arid lands within each of the States of Idaho and Wyoming be made available and subject to the terms of section four of an act of Congress entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and by amendments thereto, and that the States of Idaho and Wyoming be allowed under the provisions of said acts said additional area or so much thereof as may be necessary for the purposes and under the provisions of said acts.

The act of February 18, 1909 (Public, No. 244), extending the provisions of section 4, act of August 18, 1894, *supra*, and the amendments thereof, to the Territories of New Mexico and Arizona, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of section four of the act of Congress approved August eighteenth, eighteen hundred and ninety-four, being chapter three hundred and one to Supplement to Revised Statutes of the United States, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," and the amendments thereto be, and the same are hereby, extended to the Territories of New Mexico and Arizona, and that said Territories upon complying with the provisions of said act shall be entitled to have and receive all of the benefits herein conferred upon the States.

SEC. 2. That this act shall be in full force and effect from and after its passage.

The provisions of said section 4, act of August 18, 1894, and the amendments thereof, were also extended to the desert lands within the former Ute Indian Reservation in Colorado, by the act of February 24, 1909 (Public, No. 255). The text of which is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provision of section four of "An act making appropriation for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and the amendments thereof, approved June eleventh, eighteen hundred and ninety-six, and March third, nineteen hundred and one, respectively, be, and are

hereby, extended over and shall apply to the desert lands within the limits of all that portion of the former Ute Indian Reservation, not included in any national forest, in the State of Colorado, described and embraced in the act entitled "An act relating to lands in Colorado lately occupied by the Uncompahgre and White River Ute Indians," approved July twenty-eighth, eighteen hundred and eighty-two: *Provided*, That before a patent shall issue for any of the lands aforesaid under the terms of the act approved August eighteenth, eighteen hundred and ninety-four, and amendments thereto, the State of Colorado shall pay into the Treasury of the United States the sum of one dollar and twenty-five cents per acre for the lands so patented, and the money so paid shall be subject to the provisions of section three of the act of June fifteenth, eighteen hundred and eighty, entitled, "An act to accept and ratify the agreements submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriation for carrying out the same."

SEC. 2. That no lands shall be included in any tract to be segregated under the provisions of this act on which the United States Government has valuable improvements, or which have been reserved for any Indian schools or farm purposes.

REGULATIONS.

1. Under the provisions of the acts quoted the States and Territories are allowed ten years from the date of the approval of the application for the segregation of the land by the Secretary of the Interior, in which to irrigate and reclaim them. The Secretary of the Interior may, however, in his discretion, extend the time for irrigating and reclaiming the lands for a period of five years, or he may restore to the public domain the lands not reclaimed at the expiration of the ten years, or of the extended period.

2. The lands selected under these acts must all be desert lands as defined by the acts of 1877 and 1891, and the decisions and regulations of this department therein provided for.

Lands which produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons, are not desert lands. Lands which will produce an agricultural crop of any kind in amount sufficient to make the cultivation reasonably remunerative are not desert. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

Lands occupied by bona fide settlers and lands containing valuable deposits of coal or other minerals are not subject to selection.

3. The second paragraph of section 4, before quoted, provides that before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the land selected and proposed to be irrigated, which shall exhibit a plan showing the mode of contemplated irrigation and the source of the water. In accordance with the requirements of the act, the State must give full data to show that the

proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement by the state engineer of the amount of water available for the plan of irrigation will be necessary. The other data required can not be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the land selected must be submitted. Upon the filing of the map showing the plan of irrigation, and the lands selected, such lands will be withheld from other disposition until final action is had thereon by the Secretary of the Interior. If such final action be a disapproval of the map and plan, the lands selected shall, without further order, be subject to disposition as if such reservation had never been made; and the local officers will make the appropriate notations on the tract books and plat books, opposite those previously made, in accordance with the requirements of paragraph 7.

4. The map must be on tracing linen, in duplicate, and must be drawn to a scale not greater than 1,000 feet to 1 inch. A smaller scale is desirable, if the necessary information can be clearly shown. The map and field notes in duplicate must be filed in the local land office for the district in which the land is located. If the lands selected are located in more than one district, duplicate map and field notes need be filed in but one district and single sets in the others. Each legal subdivision of the land selected should be clearly indicated on the map by a check mark, thus: \checkmark . The map and field notes must show the connections of termini of a canal or of the initial point of a reservoir with public survey corners, the connections with public survey corners wherever section or township lines are crossed by the proposed irrigation works, and must show full data to admit of retracing the lines of the survey of the irrigation works on the ground.

5. The map should bear an affidavit of the engineer who made or supervised the preparation of the map and plan, Form 1, page 11, and also of the officer authorized by the State to make its selections under the act, Form 2, page 633. The map should be accompanied by a list in triplicate of the lands selected, designated by legal subdivisions, properly summed up at the foot of each page, and at the end of the list. If the lands selected are located in more than one district, a list in triplicate must be filed in each office, describing the lands selected in that district. *Clear* carbon copies are preferred for the duplicate and triplicate lists. The lists should be dated and verified by a certificate of the selecting agent, Form 3, page 634. The party appearing as agent of the State must file with the register and receiver written and satisfactory evidence, under seal, of his authority to act in the premises; such evidence once filed need not be duplicated

during the period for which the agent was appointed. The State should number the lists in consecutive order, beginning with No. 1, regardless of the land office in which they are to be filed. Form of title page to be prefixed to the lists of selections will be found on page 633, marked "A." Lists received at this office containing erasures will not be filed, but will be returned in order that new ones may be prepared. When a township has not been subdivided, but has had its exteriors surveyed, the whole township may be designated, omitting, however, the sections to which the State may be entitled under its grant of school lands. When the records are in such condition that the proper notations may be made, a section or part of a section of unsurveyed land may be designated in the list; but no patent can issue thereon until the land has been surveyed.

6. A contract in the form herein prescribed (Form 5, p. 634), in duplicate, signed by the state officer authorized to execute such contract, must also be filed. A carbon copy of the contract *will not be accepted.*^a The person who executes the contract on behalf of the State must furnish evidence of his authority to do so.

7. The lists must be carefully and critically examined by the register and receiver, and their accuracy tested by the plats and records of their office. When so examined and found correct in all respects, they will attach a certificate at the foot of each list (Form 4, page 634). The register must note on the map, lists, contracts, and all papers the name of the land office and the date of filing over his written signature and will thereupon post the selections in ink in the tract book after the following manner: "Selected ———, 19—, by ——— ———, the State ———, as desert land, act of August 18, 1894, serial No. ———," and on the plats he will mark the tracts so selected "State desert land selection." After the selections are properly posted and marked on the records, the lists, maps, and all papers will be transmitted to the General Land Office.

For rejected selections a new list will be required, upon which the register will note opposite each tract the objections appearing on the records and indorse thereon his reasons in full for refusing to certify the same. The State will be allowed to appeal in the manner provided for in the Rules of Practice. It is required that clear lists of approvals shall in every case be made out by the selecting agents, if after the above examination one or more tracts have been rejected, showing clearly and without erasure the tracts to which the register is prepared to certify. On the map of lands selected the register will mark *rejected* such tracts as he has rejected on the lists.

^a Printed copies of the contract, in which the list of lands can be inserted, will be furnished to the State, or to parties dealing with it, on application to the General Land Office.

8. When the canals or reservoirs required by the plan of irrigation cross public land not selected by the State, an application for right of way over such lands under sections 18 to 21, act of March 3, 1891 (26 Stat., 1095), should be filed separately, in accordance with the regulations under said act.

9. In the preceding paragraphs instructions are given for the designation of the lands by the proper state authorities. Upon the approval of the map of the lands and the plan of irrigation, the contract is executed by the Secretary of the Interior and approved by the President, as directed by the act. Upon the approval of the map and plan, the lands are reserved for the purposes of the act, said reservation dating from the date of the filing of the map and plan in the local land office. A duplicate of the approved map and plan, and of the list of lands, is transmitted for the files of the local land office, and a triplicate copy of the list is forwarded to the state authorities.

10. When patents are desired for any lands that have been segregated, the State should file in the local land office a list, to which is prefixed a certificate of the presiding officer of the state land board, or other officer of the State who may be charged with the duty of disposing of the lands which the State may obtain under the law (Form 6, page 636); and followed by an affidavit of the state engineer, or other state officer whose duty it may be to superintend the reclamation of the lands (Form 7, page 637).

11. The certificate of Form 6 is required in order to show that the state laws accepting the grant of the lands have been duly complied with.

12. The affidavit of Form 7 is required in order to show compliance with the provisions of the law, that an ample supply of water has been actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, for each tract in the list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops. A separate statement by the state engineer must be furnished, giving all the facts as to the water supply and the nature, location, and completion of the irrigation works.

If there are some high points which it is not practicable to irrigate, the nature, extent, location, and area of such points should be fully stated. If no part of a legal subdivision is susceptible of irrigation, such legal subdivision must be relinquished. Lands upon which valuable deposits of coal or other minerals are discovered will not be patented to the State under these acts.

13. These lists will be called "lists for patent," and should be numbered by the State consecutively, beginning with No. 1. The list should also show, opposite each tract, the number of the approved segregation list in which it appears. The aggregate area should be stated at the foot of each page and at the end of the list.

14. Upon the filing of such list the local officers will place thereon the date of filing and note on the records opposite each tract listed: "List for patent serial No. ———, filed ———," giving the date.

15. When said list is filed in the local land office there shall also be filed by the State a notice, in duplicate, prepared for the signature of the register and receiver, describing the land by sections, and portions of sections, where less than a section is designated (Form 8, p. 637). This notice shall be published at the expense of the State once a week in each of nine consecutive weeks, in a newspaper of established character and general circulation, to be designated by the register as published nearest the land. One copy of said notice shall be posted in a conspicuous place in the local office for at least sixty days during the period of publication.

16. At the expiration of the period of publication the State shall file in the local office proof of said publication and of payment for the same. Thereupon the register and receiver shall forward the list for patent to the General Land Office, noting thereon any protests or contests which may have been filed, transmitting such papers, and submitting any recommendations they may deem proper. They will also forward proofs of publication, of payment therefor, and of the posting of the list in their office.

17. Before patents are issued for lands within the former Southern Ute and the Ute Indian Reservations in Colorado, the State will be required to pay the price (\$1.25 per acre) fixed by the acts of March 1, 1907, and February 24, 1909. The State will be advised of the number of acres which will be included in the patent and payment shall be made to the receiver of the proper land office, who will issue a receipt as in other cases. The money will be accounted for in the same manner as other moneys received from the disposal of such lands.

18. Upon the receipt of the papers in the General Land Office such action will be taken in each case as the showing may require, and all tracts that are free from valid protest or contest, and respecting which the law and regulations have been complied with, will be certified to the Secretary of the Interior for approval and patenting.

FRED DENNETT,

Commissioner, General Land Office.

Approved April 9, 1909.

R. A. BALLINGER,

Secretary of the Interior.

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FORM 1.

STATE OF ———,

County of ———, ss:

———, being duly sworn, says he is the engineer under whose supervision the survey and plan hereon were made (or is the person employed to

make, etc.); that the tracts shown hereon to be selected are each and every one desert land as contemplated by the act of Congress approved August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434); and the act of March 3, 1901 (31 Stat., 1133, 1188);^a that he is well acquainted with the character of the land herein applied for, having personally examined same; that there is not to his knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that the land is not occupied by any settler; that the plan of irrigation herewith submitted is accurately and fully represented in accordance with ascertained facts; that the system proposed is sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary crops; and that the survey of said system of irrigation is accurately represented upon this map and the accompanying field notes.

Subscribed and sworn to before me this ____ day of ____, 19__.

[SEAL.]

Notary Public.

FORM 2.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, says that he is the _____ (designation of office) authorized by the State of _____ to make desert-land selections under the act of Congress approved August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188);^a that the plan of irrigation and survey herewith is submitted under authority of the State of _____; and that the tracts shown hereon to be selected are each and every one desert land, as contemplated by the said acts of Congress, none being of the classes designated as timber or mineral lands.

Subscribed and sworn to before me this ____ day of ____, 19__.

[SEAL.]

Notary Public.

A.

STATE OF _____,

UNITED STATES LAND OFFICE,

_____, 19__.

_____, the duly authorized agent of the State of _____, under and by virtue of an act of Congress approved August 18, 1894 (28 Stat., 372, 422), the

^a The States of Idaho and Wyoming must insert here a reference to the act of May 27, 1908 (35 Stat., 317, 347).

The State of Colorado must insert here a reference to the act of March 1, 1907 (34 Stat., 1057), when the lands are within the former Southern Ute Indian Reservation, and to the act of February 24, 1909 (Public No. 255), when the lands are within the former Ute Indian Reservation.

act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188),^a and in pursuance of the rules and regulations prescribed by the Secretary of the Interior, hereby makes and files the following list of desert public lands which the State is authorized to select under the provisions of the said acts of Congress:

FORM 3.

STATE OF _____,

County of _____, ss:

I, _____, being duly sworn depose and say that I am _____ (designation of office) authorized by the State of _____ to make desert-land selections under the act of Congress approved August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188);^a that the foregoing list of lands which I hereby select is a correct list of lands selected under said acts; that the lands are vacant, unappropriated, are not interdicted timber nor mineral lands, and are desert lands as contemplated by the said acts of Congress.

Subscribed and sworn to before me this _____ day of _____, 19____.

[SEAL.]

Notary Public.

FORM 4.

UNITED STATES LAND OFFICE,

_____,
_____, 19____.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected _____, 19____, by _____, the duly authorized agent of the State of _____; under the provisions of the act of Congress approved August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188);^a that we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct. And we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not nor is any part thereof returned and denominated as mineral or timber lands; nor is there any homestead or other valid claim to any portion of said lands on file or of record in this office; and that the said lands are, to the best of our knowledge and belief, desert lands, as contemplated by the said acts of Congress; and that the fees, amounting to \$_____, have been paid upon the said area of _____ acres.

_____, Register.

_____, Receiver.

FORM 5.

These articles of agreement, made and entered into this _____^b day of _____,^b A. D. 19____,^b by and between _____,^b Secretary of the Interior, for and on

^a See footnotes under Forms 1 and 2.

^b These blanks should be left vacant by the state agent.

behalf of the United States of America, party of the first part, and ———, for and on behalf of the State of ———, party of the second part, witnesseth:

That in consideration of the stipulations and agreements hereinafter made, and of the fact that said State has, under the provisions of section 4 of the act of Congress approved August 18, 1894, of the act of Congress approved June 11, 1896, and of the act of Congress approved March 3, 1901,^a through ———, its proper officer, thereunto duly authorized, presented its proper application for certain lands situated within said State and alleged to be desert in character and particularly described as follows, to wit: List No. — (here insert list of lands and total area), and has filed a map of said lands and exhibited a plan showing the mode by which it is proposed that said lands shall be irrigated and reclaimed and the source of the water to be used for that purpose, the said party of the first part contracts and agrees, and, by and with the consent and approval of ———^b President thereof, hereby binds the United States of America to donate, grant, and patent to said State, or to its assigns, free from cost for survey or price,^c any particular tract or tracts of said lands, whenever an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim the same, in accordance with the provisions of said acts of Congress, and with the regulations issued thereunder, and with the terms of this contract, at any time within ten years from the date of the approval of the said map of the lands.

It is further understood that said State shall not lease any of said lands or use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement; and that in selling and disposing of them for that purpose the said State may sell or dispose of not more than 160 acres to any one person, and then only to bona fide settlers who are citizens of the United States or who have declared their intention to become such citizens; and it is distinctly understood and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of Congress and to the terms of this contract, and shall show full compliance therewith before they shall have any claim against the United States for a patent to said lands.

It is further understood and agreed that said State shall have full power, right, and authority to enact such laws, and from time to time make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands as may be necessary to induce and cause such irrigation and reclamation thereof as is required by this contract and the said acts of Congress; but no such law, contract, or obligation shall in any way bind or obligate the United States to do or perform any act not clearly directed and set forth in this contract and said acts of Congress, and then only after the requirements of said acts and contract have been fully complied with.

Neither the approval of said application, map, and plan, nor the segregation of said land by the Secretary of the Interior, nor anything in this contract, or in the said acts of Congress, shall be so construed as to give said State any interest whatever in any lands upon which, at the date of the filing of the map and plan hereinbefore referred to, there may be an actual settlement by a bona

^a See footnotes under Forms 1 and 2.

^b These blanks should be left vacant by the state agent.

^c The words "or price" must be eliminated before the contract is signed on behalf of the State of Colorado when the lands involved are within the former Southern Ute or Ute Indian reservations.

fide settler, qualified under the public land laws to acquire title thereto, or which are known to be valuable for their deposits of coal or other minerals.

It is further understood and agreed that as soon as an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of said lands the said State or its assigns may make proof thereof under and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior, and as soon as such proof shall have been examined and found to be satisfactory patents shall issue to said State, or to its assigns, for the tracts included in said proof.

The said State shall, out of the money arising from its disposal of said lands, first reimburse itself for any and all costs and expenditures incurred by it in irrigating and reclaiming said lands, or in assisting its assigns in so doing; and any surplus then remaining after the payment of the cost of such reclamation shall be held as a trust fund, to be applied to the reclamation of other desert lands within said State.

This contract is executed in duplicate, one copy of which shall be placed of record and remain on file with the Commissioner of the General Land Office, and the other shall be placed of record and remain on file with the proper officer of said State, and it shall be the duty of said State to cause a copy thereof, together with a copy of all rules and regulations issued thereunder or under said acts of Congress, to be spread upon the deed records of each of the counties in said State in which any of said lands shall be situated.

In testimony whereof the said parties have hereunto set their hands the day and year first herein written.

_____,
Secretary of the Interior.
 State of _____.
 By _____.

APPROVAL.

To all to whom these presents shall come, greeting:

Know ye, that I, _____,^a President of the United States of America, do hereby approve and ratify the attached contract and agreement, made and entered into on the _____^a day of _____,^a 19—,^a by and between _____,^a Secretary of the Interior, for and on behalf of the United States, and _____, for and on behalf of the State of _____, under section 4 of the act of Congress approved August 18, 1894, the act approved June 11, 1896, and the act approved March 3, 1901.^b

FORMS FOR VERIFICATION AND PUBLICATION OF LISTS FOR PATENT.

FORM 6.

I, _____, do hereby certify that I am the _____, (designation of office) of the State of _____; that I am charged with the duty of disposing of the lands granted to the State in pursuance of section 4, act of August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188);^b and that the laws of the

^a These blanks should be left vacant by the state agent.

^b See footnotes under Forms 1 and 2.

said state relating to the said grant from the United States have been complied with in all respects as to the following lists of lands, which is hereby submitted on behalf of the said State for the issuance of patent under said acts of Congress.

[Here add list of lands.]

FORM 7.

To follow list of lands.

STATE OF _____,

County of _____, ss:

_____, being duly sworn, deposes and says that he is the _____ (designation of office) of the State of _____, charged with the duty of supervising the reclamation of lands segregated under section 4, act of August 18, 1894 (28 Stat., 372, 422), the act of June 11, 1896 (29 Stat., 434), and the act of March 3, 1901 (31 Stat., 1133, 1188),^a that he has examined the lands designated on the foregoing list, and that an ample supply of water has been actually furnished (in a substantial ditch or canal; or by artesian wells or reservoirs) for each tract in said list, sufficient to thoroughly irrigate and reclaim it, and to prepare it to raise ordinary agricultural crops.

Subscribed and sworn to before me this _____ day of _____, 19—.

[SEAL.]

Notary Public.

FORM 8.

Form for published notice.

UNITED STATES LAND OFFICE,

_____, _____, 19—.

To whom it may concern:

Notice is hereby given that the State of _____ has filed in this office the following list of lands, to wit, _____, and has applied for a patent for said lands under the acts of August 18, 1894 (28 Stat., 372, 422), June 11, 1896 (29 Stat., 434), and March 3, 1901 (31 Stat., 1133, 1188),^a relating to the granting of not to exceed a million acres^b of arid land to each of certain States; and that the said list, with its accompanying proofs, is open for the inspection of all persons interested, and the public generally.

Within the next sixty days following the date of this notice, protests or contests against the claim of the State to any tract described in the list, on the ground of failure to comply with the law, on the ground of the nondesert character of the land, on the ground of a prior adverse right, or on the ground

^a See footnotes under Forms 1 and 2.

^b In the cases of Idaho and Wyoming 2,000,000 acres.

that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C.

_____, Register.
_____, Receiver.

SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE HOMESTEAD ENTRIES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 10, 1909.

1. Persons desiring to make homestead entries should first fully inform themselves as to the character and quality of the lands they desire to enter, and should in no case apply to enter until they have visited and fully examined each legal subdivision for which they make application, as satisfactory information as to the character and occupancy of public lands can not be obtained in any other way.

As each applicant is required to swear that he is well acquainted with the character of the land described in his application, and as all entries are made subject to the rights of prior settlers, the applicant can not make the affidavit that he is acquainted with the character of the land, or be sure that the land is not already appropriated by a settler, until after he has actually inspected it.

Information as to whether a particular tract of land is subject to entry may be obtained from the register or receiver of the land district in which the tract is located, either through verbal or written inquiry, but these officers must not be expected to give information as to the character and quality of unentered land or to furnish extended lists of lands subject to entry, except through plats and diagrams which they are authorized to make and sell as follows:

For a township diagram showing entered land only.....	\$1.00
For a township plat showing form of entries, names of claimants, and character of entries	2.00
For a township plat showing form of entries, names of claimants, character of entry and number.....	3.00
For a township plat showing form of entries, names of claimants, character of entry, number, and date of filing or entry, together with topography, etc	4.00

A list showing the general character of all the public lands remaining unentered in the various counties of the public-land States on the 30th day of the preceding June may be obtained at any time by addressing "The Commissioner of the General Land Office, Washington, D. C."

All blank forms of affidavits and other papers needed in making application to enter or in making final proofs can be obtained by applicants and entrymen from the land office for the district in which the land lies.

2. *Kind of lands subject to homestead entry.*—All unappropriated surveyed public lands are subject to homestead entry if they are not mineral or saline in character and are not occupied for the purposes of trade or business and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city; but homestead entries on lands within certain areas (such as lands in Alaska, and lands withdrawn under the reclamation act, certain ceded Indian lands, and lands within abandoned military reservations, etc.) must be entered subject to the particular requirement of the laws under which such lands were opened to entry. None of these particular requirements are set out in these suggestions, but information as to them may be obtained by either verbal or written inquiries addressed to the register and receiver of the land office of the district in which such lands are situated.

HOW CLAIMS UNDER THE HOMESTEAD LAW ORIGINATE.

3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind.

4. *Settlements may be made under the homestead laws* by all persons qualified to make either an original or a second homestead entry as explained in paragraphs 6 and 13, and in order to make settlement a settler must personally go upon and improve or establish residence on the land he desires. By making settlement in this way the settler gains the right to enter the land settled upon as against all other persons, but not as against the Government should the land be withdrawn by it for other purposes.

A settlement made on any part of a surveyed technical quarter section gives the settler the right to enter all of that quarter section which is then subject to settlement, although he may not place improvements on each 40-acre subdivision; but if the settler desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter section he should perform some act of settlement—that is, make some improvement—on each of the smallest legal subdivisions desired. When settlement is made on unsurveyed lands, the settler must plainly mark the boundaries of all the lands claimed by him.

Settlement must be made by the settler in person, and can not be made by his agent, and each settler must, within a reasonable time after making his settlement, establish and thereafter continuously maintain an actual residence on the land, and if he, or his widow, heirs, or devisees fail to do this, or if he, or his widow, heirs, or devisees fail to make entry within three months from the time he first settles on surveyed lands, or within three months from the filing in the local land office of the plat of survey of unsurveyed lands on which he made settlement, the right of making entry of the lands settled on will be lost in case of an adverse claim, and the land will become subject to entry by the first qualified applicant.

5. *Soldiers' and sailors' declaratory statements* may be filed in the land office for the district in which the lands desired are located by any persons who have been honorably discharged after ninety days' service in the army or navy of the United States during the war of the rebellion or during the Spanish-American war or the Philippine insurrection. Declaratory statements of this character may be filed either by the soldier or sailor in person or through his agent acting under a proper power of attorney, but the soldier or sailor must make entry of the land in person, and not through his agent, within six months from the filing of his declaratory statement, or he may make entry in person without first filing a declaratory statement if he so chooses. The application to enter may be presented to the land office through the mails or otherwise, but the declaratory statement must be presented at the land office in person, either by the soldier or sailor, or by his agent, and can not be sent through the mails.

BY WHOM HOMESTEAD ENTRIES MAY BE MADE.

6. Homestead entries may be made by any person who does not come within either of the following classes:

- (a) Married women, except as hereinafter stated.
- (b) Persons who have already made homestead entry, except as hereinafter stated.
- (c) Foreign-born persons who have not declared their intention to become citizens of the United States.
- (d) Persons who are the owners of more than 160 acres of land in the United States.
- (e) Persons under the age of 21 years who are not the heads of families, except minors who make entry as heirs, as hereinafter mentioned, or who have served in the army or navy during the existence of an actual war for at least fourteen days.
- (f) Persons who have acquired title to or are claiming under any of the agricultural public-land laws, through settlement or entry made

since August 30, 1890, any other lands which, with the lands last applied for, would amount in the aggregate to more than 320 acres. See, however, modification hereof in the regulations concerning enlarged homestead entries under the act of February 19, 1909 (37 L. D., 546).

7. *A married woman*, who has all of the other qualifications of a homesteader, may make a homestead entry under any one of the following conditions:

(a) Where she has been actually deserted by her husband.

(b) Where her husband is incapacitated by disease or otherwise from earning a support for his family, and the wife is really the head and main support of the family.

(c) Where the husband is confined in a penitentiary and she is actually the head of the family.

(d) Where the married woman is the heir of a settler or contestant who dies before making entry.

(e) Where a married woman made improvements and resided on the lands applied for before her marriage, she may enter them after marriage if her husband is not holding other lands under an unperfected homestead entry at the time she applies to make entry.

A married woman can not make entry under any of these conditions unless the laws of the State where the lands applied for are situated give her the right to acquire and hold title to lands as a *femme sole*.

8. *If an entryman deserts his wife* and abandons the land covered by his entry, his wife then has the exclusive right to contest the entry if she has continued to reside on the land, and on securing its cancellation she may enter the land in her own right, or she may continue her residence and make proof in the name of and as the agent for her husband, and patent will issue to him.

9. *If an entryman deserts his minor children* and abandons his entry after the death of his wife, the children have the same rights the wife could have exercised had she been deserted during her lifetime.

10. *If a husband and wife are each holding an original entry or a second entry at the same time*, they must relinquish one of the entries, unless one of them holds an entry as the heir of a former entryman or settler. In cases where they can not hold both entries, they may elect which one they will retain and relinquish the other.

11. *A widow*, if otherwise qualified, may make a homestead entry notwithstanding the fact that her husband made an entry, and notwithstanding she may be at the time claiming the unperfected entry of her deceased husband.

12. *A person serving in the army or navy of the United States* may make a homestead entry if some member of his family is residing on the lands applied for, and the application and accompanying affidavits may be executed before the officer commanding the branch of the service in which he is engaged.

13. *Second homestead entries* may be made, under statutes specifically authorizing such entries, by the following classes of persons, if they are otherwise qualified to make entry:

(a) By a former entryman who commuted his entry prior to June 5, 1900.

(b) By a homestead entryman who, prior to May 17, 1900, paid for lands to which he would have been afterwards entitled to receive patent without payment, under the "free-homes act."

(c) By any person who for any cause lost, forfeited, or abandoned his homestead entry before February 8, 1908, if the former entry was not canceled for fraud or relinquished for a valuable consideration. Where an entryman sells his improvements on the land and relinquishes his entry in connection therewith, or if he receives the amount of his filing fees or any other amount, it is held that he relinquishes for a valuable consideration.

(d) Any person who has already made final proof for less than 160 acres under the homestead laws may, if he is otherwise qualified, make a second or additional homestead entry for such an amount of public land as will, when added to the amount for which he has already made proof, not exceed in the aggregate 160 acres. See, however, instructions under the enlarged homestead act (37 L. D., 546).

Any person desiring to make a second entry must first select and inspect the lands he intends to enter and then make application therefor on blanks furnished by the register and receiver. Each application must state the date and number of his former entry and the land office at which it was made, or give the section, township, and range in which the land entered was located. Any person mentioned in paragraph (c) above must show, by the oaths of himself and some other person or persons, the time when his former entry was lost, forfeited, or abandoned, and that it was not canceled for fraud or abandoned or relinquished for a valuable consideration.

14. *An additional homestead entry* may be made by a person for such an amount of public lands adjoining lands then held and resided upon by him under his original entry as will, when added to such adjoining lands, not exceed in the aggregate 160 acres. An entry of this kind may be made by any person who has not acquired title to and is not, at the date of his application, claiming under any of the agricultural public land laws, through settlement or entry made since August 30, 1890, any other lands which, with the land then applied for, would exceed in the aggregate 320 acres, but the applicant will

not be required to show any of the other qualifications of a homestead entryman. See, however, instructions under the enlarged homestead act (37 L. D., 546).

15. *An adjoining farm entry* may be made for such an amount of public lands lying contiguous to lands owned and resided upon by the applicant as will not, with the lands so owned and resided upon, exceed in the aggregate 160 acres; but no person will be entitled to make entry of this kind who is not qualified to make an original homestead entry. A person who has made one homestead entry, although for a less amount than 160 acres, and perfected title thereto is not qualified to make an adjoining farm entry.

HOW HOMESTEAD ENTRIES ARE MADE.

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United States commissioner, or a United States court commissioner, or a judge, or a clerk of a court of record, in the county or parish in which the land lies, or before any officer of the classes named who resides in the land district and nearest and most accessible to the land, although he may reside outside of the county in which the land is situated.

17. *Each application to enter and the affidavits accompanying it must recite all the facts* necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; that the application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself.

18. *All applications to make second homestead entries* must, in addition to the facts specified in the preceding paragraph, show the number and date of the applicant's original entry, the name of the land office where the original entry was made, and the description of the land covered by it, and it should state fully all of the facts which entitle the applicant to make a second entry.

19. *All applications by persons claiming as settlers* must, in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers must state facts showing the death of the settler and their right to make entry; that the settler was qualified to make entry at the time of his death, and that the heirs or devisees applying to enter are citizens of the United States, or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devisees, nor will the fact that a person has made entry as the heir or devisee of the settler prevent him from making an entry in his own individual right, if he is otherwise qualified to do so.

20. *All applications by soldiers, sailors, or their widows*, or the guardians of their minor children should be accompanied by proper evidence of the soldier's or sailor's service and discharge, and of the fact that the soldier or sailor had not, prior to his death, made an entry in his own right. The application of the widow of the soldier or the sailor must also show that she has remained unmarried, and applications for children of soldiers or sailors must show that the father died without having made entry; that the mother died or remarried without making entry, and that the person applying to make entry for them is their legally appointed guardian.

RIGHTS OF WIDOWS, HEIRS, OR DEVISEES UNDER THE HOMESTEAD LAWS.

21. *If a homestead settler dies* before he makes entry, his widow has the exclusive right to enter the lands covered by his settlement, and if there be no widow, then any person to whom he has devised his settlement rights by proper will has the exclusive right to make the entry; but if the settler dies leaving neither widow nor will, then the right to enter the lands covered by his settlement passes to the persons who are named as his heirs by the laws of the State in which the land lies. The persons to whom the settler's right of entry passes must make entry within the time named in paragraph 4 or they will forfeit their right to the next qualified applicant. They may, however, make entry after that time if no adverse claim has attached.

22. *If a homestead entryman dies before making final proof* his rights under his entry will pass to his widow; or if there be no widow, and the entryman's children are all minors, the right to a patent vests in them upon making publication of notice and proof of the death of the entryman without a surviving widow, that they are the only minor children and that there are no adult heirs of the entryman, or the land may be sold for the benefit of such minor children in the manner in which other lands belonging to minors are sold under the laws of the State or Territory in which the lands are located.

If the children of a deceased entryman are not all minors and his wife is dead, his rights under his entry pass to the person to whom such rights were devised by the entryman's will, or if an entryman dies without leaving either a widow or a will, and his children are not all minors, his rights under his entry will pass to the persons who are his heirs under the laws of the State or Territory in which the lands are situated.

23. *If a contestant dies* after having secured the cancellation of an entry, his right as a successful contestant to make entry passes to his heirs; and if the contestant dies before he has secured the cancellation of the entry he has contested, his heirs may continue the prosecution of his contest and make entry if they are successful in the contest. In either case to entitle the heirs to make entry they must show that the contestant was a qualified entryman at the date of his death; and in order to earn a patent the heirs must comply with all the requirements of the law under which the entry was made to the same extent as would have been required of the contestant had he made entry.

No foreign-born persons can claim rights as heirs under the homestead laws unless they have become citizens of the United States or have declared their intentions to become citizens.

24. *The unmarried widow, or in case of her death or remarriage, the minor children of soldiers and sailors* who were honorably discharged after ninety days' actual service during the war of the rebellion, the Spanish-American war, or the Philippine insurrection may make entry as such widow or minor children if the soldier or sailor died without making entry. The minor children must make a joint entry through their duly appointed guardian. The making of an entry by the widow or minor children of a soldier or sailor exhausts their rights under the general homestead law.

RESIDENCE AND CULTIVATION.

25. *The residence and cultivation required by the homestead law* means a continuous maintenance of an actual home on the land entered, to the exclusion of a home elsewhere, and continuous annual cultivation of some portion of the land. A mere temporary sojourn on the land, followed by occasional visits to it once in six months or

oftener, will not satisfy the requirements of the homestead law, and may result in the cancellation of the entry.

26. *No specified amount of either cultivation or improvements* is required, but there must in all cases be such continuous improvement and such actual cultivation as will show the good faith of the entryman. Lands covered by homestead entry may be used for grazing purposes if they are more valuable for pasture than for cultivation to crops. When lands of this character are used in good faith for pasturage, actual grazing will be accepted in lieu of actual cultivation. The fact that lands covered by homestead entries are of such a character that they can not be profitably cultivated or pastured will not be accepted as an excuse for failure to either cultivate or graze them. See instructions under "Enlarged homestead act" (37 L. D., 546) as to amount of cultivation required on entries made under that act.

27. *Actual residence on the lands entered must begin within six months* from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15 and residence with improvements and annual cultivation must continue until the entry is five years old, except in cases hereafter mentioned, but all entrymen who actually resided upon and cultivated lands entered by them prior to making such entries may make final proof at any time after entry when they can show five years' residence and cultivation.

Under certain circumstances, leaves of absence may be granted in the manner pointed out in paragraph 36 of these suggestions, but the entryman can not claim credit for residence during the time he is absent under such leave.

An extension of time for establishing residence can be granted only in cases where the entryman is actually prevented by climatic hindrances from establishing his residence within the required time. This extension can not be granted in advance; but on making final proof or in case a contest is instituted against the entry the entryman may show the storms, floods, blockades of snow or ice, or other climatic reasons which rendered it impossible for him to commence residence within six months from date of entry, and he must as soon as possible after the climatic hindrances disappear establish his residence on the land entered. Failure to establish residence within six months from date of entry will not necessarily result in a forfeiture of the entry, provided the residence be established prior to the intervention of an adverse claim.

After an entryman has fully complied with the law and has submitted proof he is no longer required to live on the land. But all entrymen should understand that if they discontinue their residence on the land prior to the issuance of patent they do so at their risk,

and by so doing they may place themselves in such a position that they may be unable to comply with requirements made by the General Land Office, should their proof on examination there be found unsatisfactory.

28. *Residence and cultivation by soldiers and sailors* of the classes mentioned in paragraph 5 must begin within six months from the time they file their declaratory statements regardless of the time when they make entry under such statement, but if they make entry without filing a declaratory statement they must begin their residence within six months from the date of such entry, and residence thus established must continue in good faith, with improvements and annual cultivation for at least one year, but after one year's residence and cultivation the soldier or sailor is entitled to credit on the remainder of the five-year period for the term of his actual naval or military service, or if he was discharged from the army or navy because of wounds received or disabilities incurred in the line of duty he is entitled to credit for the whole term of his enlistment. No credit can be allowed for military service where commutation proof is offered.

29. *A soldier or sailor making entry during his enlistment* in time of peace is not required to reside personally on the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is five years old or until it has been commuted, but a soldier or sailor is not entitled to credit on account of his military service in time of peace.

30. *Widows and minor orphan children of soldiers and sailors* who make entry as such widows and children must begin their residence and cultivation of the lands entered by them within six months from the dates of their entries, or the filing of declaratory statement, and thereafter continue both residence and cultivation for such period as will, when added to the time of their husbands' or fathers' military or naval service, amount to five years from the date of the entry, and if the husbands or fathers either died in the service or were discharged on account of wounds or disabilities incurred in the line of duty, credit for the whole term of their enlistment, not to exceed four years, may be taken, but no patent will issue to such widows or children until there has been residence and cultivation by them for at least one year. No credit can be allowed for military service where commutation proof is offered.

31. *Persons who make entry as heirs of settlers* are not required to both reside upon and cultivate the land entered by them, but they must, within six months from the dates of their entries, begin and thereafter continuously maintain either residence or cultivation on the land entered by them for such a period of time as, added to the time during which the settler resided on and cultivated the land, will

make five years, unless their entries be sooner commuted. Commutation proof can not, however, be made unless at least fourteen months' actual residence is shown, performed either by the settler or the heirs or in part by the settler and in part by the heirs.

32. *The widow, heirs, or devisees of a homestead entryman* who dies before he earns patent are not required to both reside upon and cultivate the lands covered by his entry, but they must, within six months after the death of the entryman, begin either residence or cultivation on the land covered by the entry, and thereafter continuously maintain either residence or cultivation for such a period of time as will, when added to the time during which the entryman complied with the law, amount in the aggregate to the required five years, unless they sooner commute the entry. But commutation proof can not be made unless fourteen months' actual residence can be shown, performed by the entryman or by the widow, heirs, or devisees, or in part by the entryman and in part by the widow, heirs or devisees.

33. *Homestead entrymen who have been elected* to either a federal, state, or county office, after they have made entry and established an actual residence on the land covered by their entries are not required to continue such residence during their term of office, if the discharge of their bona fide official duties necessarily requires them to reside elsewhere than upon the land; but they must continue their cultivation and improvements for the required length of time. Such an office holder can not commute, however, unless he can show at least fourteen months' actual residence. See circulars of February 16 and 20, 1909 (37 L. D., 449), and October 18, 1907 (36 L. D., 124).

A person who makes entry after he has been elected to office is not excused from maintaining residence, but must comply with the law in the same manner as though he had not been elected.

34. *Residence is not required* on lands covered by an adjoining farm entry of the kind mentioned in paragraph 15; but a person who makes an adjoining farm entry is not entitled to a patent until he has continued his residence and cultivation for the full five years, on the adjoining lands owned by him at the time he made entry, or on the lands entered by him, unless he sooner commutes his entry after fourteen months' residence on either the entered lands or the adjoining lands owned by him. A person who has made an additional entry for lands adjoining his original entry (see paragraph 14) is not entitled to a patent to the lands so entered until he can show five years' residence either on the original entry, or in part on the original and in part on the additional.

35. *Neither residence nor cultivation by an insane homestead entryman* is necessary after he becomes insane, if such entryman made entry and established residence before he became insane and complied with the requirements of the law up to the time his insanity began.

LEAVES OF ABSENCE.

36. Leaves of absence for one year or less may be granted to entrymen who have established actual residence on the lands entered by them in all cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent upon him by a cultivation of the land.

Applications for leaves of absence should be addressed to the register and receiver of the land office where the entry was made and should be sworn to by the applicant and some other disinterested person before such register and receiver or before some officer in the land district, using a seal and authorized to administer oaths, except in cases where through age, sickness, or extreme poverty the entryman is unable to visit the district for that purpose, when the oath may be made outside of the land district. All applications of this kind should clearly set forth:

(a) The number and date of the entry, a description of the lands entered, the date of the establishment of his residence on the land, and the extent and character of the improvements and cultivation made by the applicant.

(b) The kind of crops which failed or were destroyed and the cause and extent of such failure or destruction.

(c) The kind and extent of the sickness, disease, or injury assigned, and the extent to which the entryman was prevented from continuing his residence upon the land, and, if practicable, a certificate signed by a reliable physician, as to such sickness, disease, or injury, should be furnished.

(d) The character, cause, and extent of any unavoidable casualty which may be made the basis of the application.

(e) The dates from which and to which the leave of absence is requested.

COMMUTATION OF HOMESTEAD ENTRIES.

37. All original, second, and additional homestead, and adjoining farm entries may be commuted, except such entries as are made under particular laws which forbid their commutation.

When actual residence was established within six months from the date of any entry made before November 1, 1907, and thereafter continuously maintained with improvements and cultivation until the expiration of fourteen months from the date of the entry and in cases where there has been at least fourteen months' actual and continuous residence and cultivation on any land covered by any entry made on or after November 1, 1907, the entryman or his widow, heirs, or devisees may obtain patent by proving such residence and cultivation

and paying the cost of such proof, the land office fees, and the price of the land, which is \$1.25 per acre outside of the limits of railroad grants and \$2.50 per acre for land within the granted limits, except as to certain lands which were opened under statutes requiring payment of a price different from that here mentioned. See circular October 18, 1907 (36 L. D., 124).

HOMESTEAD FINAL AND COMMUTATION PROOF.

38. Either final or commutation proof may be made at any time when it can be shown that residence and cultivation have been maintained in good faith for the required length of time, but if final proof is not made within seven years from the date of a homestead entry the entry will be canceled unless some good excuse for the failure to make the proof within the seven years is given with satisfactory final proof as to the required residence and cultivation made after the expiration of the seven years.

39. *By whom proof may be offered.*—Final proof must be made by the entrymen themselves, or by their widows, heirs, or devisees, and can not be made by their agents, attorneys in fact, administrators, or executors, except in the cases hereinafter mentioned. In order to submit final five-year proof the entryman, his widow, or the heir or devisee submitting proof must be a citizen of the United States. As a general rule commutation proof may be submitted by one who has declared his or her intention to become a citizen, but on entries made for land in certain reservations opened under special acts the person submitting commutation proof must be a citizen of the United States.

(a) If an entryman becomes insane after making his entry and establishing residence, patent will issue to the entryman on proof by his guardian or legal representative that the entryman had complied with the law up to the time his insanity began. In such a case if the entryman is an alien and has not been fully naturalized evidence of his declaration of intention to become a citizen is sufficient.

(b) If a person has made a homestead entry and afterwards died while he was serving as a soldier or a sailor during the Spanish-American war or the Philippine insurrection, patent will issue upon proof made by his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his, her, or their legal representatives.

(c) Where entries have been made for minor orphan children of soldiers or sailors, proof may be offered by their guardian, if any, if the children are still minors at the time the proof should be made.

(d) When an entryman has abandoned the land covered by his entry and deserted his wife, she may make final or commutation proof as his agent, or, if his wife be dead and the entryman has

deserted his minor children, they may make the same proof as his agent, and patent will issue in the name of the entryman.

(e) When an entryman dies leaving children, all of whom are minors, and both parents are dead, the executor or administrator of the entryman, or the guardian of the children, may, at any time within two years after the death of the surviving parent, sell the land for the benefit of the children by proper proceedings in the proper local court, and patent will issue to the purchaser; but if the land is not so sold patent will issue to the minors upon proof of death, heirship, and minority being made by such administrator or guardian.

40. *How proofs may be made.*—Final or commutation proofs may be made before any of the officers mentioned in paragraph 16, as being authorized to administer oaths to applicants.

Any person desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

41. *Publication fees.*—Applicants shall hereafter be required to make their own contracts for publishing notice of intention to make proof, and they shall make payment therefor directly to the publishers, the newspaper being designated and the notice prepared by the register.

42. *Duty of officers before whom proofs are made.*—On receipt of the notice mentioned in the preceding paragraph, the register will issue a notice naming the time, place, and officer before whom the proof is to be made and cause the same to be published once a week for five consecutive weeks in a newspaper of established character and general circulation published nearest the land, and also post a copy of the notice in a conspicuous place in his office.

On the day named in the notice the entryman must appear before the officer designated to take proof with at least two of the witnesses named in the notice; but if for any reason the entryman and his witnesses are unable to appear on the date named, the officer should continue the case from day to day until the expiration of ten days, and the proof may be taken on any day within that time when the entryman and his witnesses appear, but they should, if it is at all possible to do so, appear on the day mentioned in the notice. Entrymen are advised that they should, whenever it is possible to do so, offer their proofs before the register or receiver, as it may be found necessary to refer all proofs made before other officers to a special

agent for investigation and report before patent can issue, while, if the proofs are made before the register or receiver, there is less likelihood of this being done, and there is less probability of the proofs being incorrectly taken. By making proof before the register or receiver the entrymen will also save the fees which they are required to pay other officers, as they will be required under the law to pay the register and receiver the same amount of fees in each case, regardless of the fact that the proof may have been taken before some other officer.

Entrymen are cautioned against improvidently and improperly commuting their entries, and are warned that any false statement made in either their commutation or final proof may result in their indictment and punishment for the crime of perjury.

43. *Fees and commissions.*—When a homesteader applies to make entry he must pay in cash to the receiver a fee of \$5 if his entry is for 80 acres or less, or \$10 if he enters more than 80 acres. And in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of \$1 for each 40-acre tract entered outside of the limits of a railroad grant and \$2 for each 40-acre tract entered within such limits. Fees under the enlarged homestead act are the same as above, but the commissions are based upon the area of the land embraced in the entry. (See 37 L. D., 546.) On all final proofs made before either the register or receiver, or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each 100 words reduced to writing, and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the commission due to the register and receiver on entries and final proofs, and the testimony fees under final proofs, are 50 per cent more than those above specified, but the entry fee of \$5 or \$10, as the case may be, remains the same in all the States.

United States commissioners, United States court commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final proof witness to final proof testimony, which has been reduced to writing by them.

44. *The alienation of all or any part of the land* embraced in a homestead prior to making proof, except for the public purposes mentioned in section 2288, Revised Statutes, will prevent the entryman from making satisfactory proof, since he is required to swear that he has not alienated any part of the land except for the purposes mentioned in section 2288, Revised Statutes.

A mortgage by the entryman prior to final proof for the purpose of securing money for improvements, or for any other purpose not inconsistent with good faith, is not considered such an alienation of the land as will prevent him from submitting satisfactory proof. In such a case, however, should the entry be canceled for any reason prior to patent, the mortgagee would have no claim on the land or against the United States for the money loaned.

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

CLASSIFICATION AND VALUATION OF COAL LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 10, 1909.

1. For the purposes of classification and valuation, coal deposits shall be divided into four classes:

- (A) Anthracite, semianthracite, coking, and blacksmithing coals;
- (B) High-grade bituminous noncoking coals having a fuel value of not less than 12,000 B. T. U. on an unweathered, air-dried sample;
- (C) Bituminous coals having a fuel value of less than 12,000 B. T. U. on an unweathered, air-dried sample, and high-grade subbituminous coals having a fuel value of more than 9,500 B. T. U. on an unweathered, air-dried sample;

(D) Low-grade subbituminous coals having a fuel value below 9,500 B. T. U. on an unweathered, air-dried sample, and all lignite coals.

CLASSIFICATION OF COAL LANDS.

2. Lands underlain by coal beds, none of which contain 14 inches or over of coal, exclusive of partings, of class A, B, or C, or over 36 inches of class D, shall be classed as noncoal land.

3. Lands containing coals of classes A and B of any thickness at depths greater than 3,000 feet, shall be classified as noncoal lands, except where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 3,000-foot shaft.

4. Lands containing coals of class C of any thickness at a depth greater than 2,000 feet shall be classed as noncoal land, except where the rocks are practically horizontal and the coal lies within two miles of the outcrop or point at which it can be reached by a 2,000-foot shaft.

5. Lands containing coals of class D of any thickness at a depth greater than 500 feet shall be classed as noncoal land, except where the rocks are practically horizontal and the coal lies within one mile of the outcrop or point at which it can be reached by a 500-foot shaft.

VALUATION OF COAL LANDS.

6. The price of coal lands of classes A, B, and C shall be determined on the basis of estimated tonnage at the rate of one-half to 1 cent per estimated ton for class C; 1 to 2 cents per estimated ton for class B; and 2 to 3 cents per estimated ton for class A, when the lands are within fifteen miles of a completed railroad, and half that much when at a greater distance, but the price shall in no case exceed \$300, except in districts which contain large coal mines where the character and extent of the coal are well known to the purchaser. When, however, topographic conditions affect the accessibility of the coal, the land within the 15-mile limit may be given a lower valuation, but in no case shall it be placed at less than the minimum.

7. The rates per ton in the preceding paragraph are based on the assumption that only one bed of coal is present. If more than one bed occurs in any tract of land in such relationship that the mining of one will not necessarily disturb the other, then for the second bed there shall be added to the price of the first bed 60 per cent of the value of the second bed according to the schedule; 40 per cent of the value of the third, and 30 per cent of the value of each additional bed, but the estimated price for coal shall in no case exceed \$300, except in districts which contain large coal mines where the character and extent of the coal deposits are well known to the purchaser.

8. The tonnage shall be estimated for the purpose of valuation on the basis of 1,000 tons recovery per acre-foot.

9. The coal price of lands of class D shall be the minimum provided by law, \$20 per acre when within fifteen miles of a railroad and \$10 per acre when at a greater distance.

10. In all valuations of coal lands any special conditions enhancing the value of the land for coal-mining purposes shall be taken into consideration.

11. When only a part of a smallest legal subdivision is underlain by coal, the price per acre shall be fixed by dividing the total estimated coal values by the number of acres in the subdivision, but in no case shall this be less than the minimum provided by law.

12. When lands which were at time of classification more than fifteen miles from a railroad are brought within the 15-mile limit by the beginning of operation of a new road, all values given in the original classification shall be doubled by the register and receiver.

13. Except in case of entries now pending, or entries made prior to classification, review of classification or valuation may be had only

upon application therefor to the Secretary, accompanied by a showing clearly and specifically setting forth conditions not existing or known at time of examination.

Approved:

R. A. BALLINGER, *Secretary*.

AMENDMENTS UNDER SEC. 2372, R. S.—ACT OF FEBRUARY 24, 1909.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 22, 1909.

Registers and Receivers, United States Land Offices.

GENTLEMEN: By act of February 24, 1909 (Public—258), section 2372, United States Revised Statutes, is amended to read as follows:

SEC. 2372. In all cases where an entry, selection, or location has been or shall hereafter be made of a tract of land not intended to be entered, the entryman, selector, or locator, or, in case of his death, his legal representatives, or, when the claim is by law transferable, his or their transferees, may, in any case coming within the provisions of this section, file his or their affidavit, with such additional evidence as can be procured showing the mistake as to the numbers of the tract intended to be entered and that every reasonable precaution and exertion was used to avoid the error, with the register and receiver of the land district in which such tract of land is situate, who should transmit the evidence submitted to them, in each case, together with their written opinion both as to the existence of the mistake and the credibility of every person testifying thereto, to the Commissioner of the General Land Office, who, if he be entirely satisfied that the mistake has been made and that every reasonable precaution and exertion has been made to avoid it, is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, if the same has not been disposed of and is subject to entry, or if not subject to entry, then to any other tract liable to such entry, selection, or location; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize such change of entry, nor shall anything herein contained affect the right of third persons.

The following rules are given which are to govern in the consideration of applications to amend entries, selections, or locations:

1. Applications for amendment must be filed in the local land office of the United States having jurisdiction over the land sought to be entered, and should be substantially in accordance with the printed form herewith. This form may be used for the amendment of nonmineral entries where the applicant is either the original entryman, the assignee, or transferee, by making such modifications as the facts may justify. Each application must be verified by the oath of the applicant and corroborating witnesses, and must describe the land erroneously entered as well as that desired by way of amend-

ment, by subdivision, section, township, and range; and where the land originally intended to be entered has been disposed of the applicant must describe that land also and show why he can not obtain it.

2. The application must contain a full statement of all the facts and circumstances, showing how the mistake occurred and what precautions were taken prior to the filing of the erroneous entry, selection, or location, to avoid error in the description. The showing in this regard must be complete, because no amendment will be allowed unless it is made to appear that proper precaution was taken to avoid error at the time of making the original entry, location, or selection; and where there has been undue delay in applying for amendment the application will be closely scrutinized and will not be allowed unless the utmost good faith is shown and the delay explained to the entire satisfaction of the Commissioner of the General Land Office.

3. The application must also show that no timber or other thing of value has been taken from the land erroneously entered, located, or selected; that the land sought by way of amendment is not occupied or claimed by any adverse claimant; that it is of the character contemplated by the law under which the claim is presented, and in cases of nonmineral claims the kind and quantity of timber on each legal subdivision applied for must be stated.

4. Where no final certificate has been issued and the amendment is sought by the original claimant, it must be shown that the land embraced in the erroneous entry, location, or selection has not been sold, assigned, relinquished, or in any way encumbered, and for this purpose the affidavit of the applicant, corroborated as hereinafter required, will be sufficient; but where final certificate has issued or where amendment is sought by a transferee, it must be shown by a certificate from the proper recording officer of the county in which the land is situated, or by satisfactory abstract of title, that the applicant is the owner of such land under the entry, location, or selection, as the case may be, and it must also be shown that there are no liens, unpaid taxes, or other incumbrance charged against the land. Where patent has been issued reconveyance of the land embraced in the patent must be made by deed executed by the claimant and also by his wife, if he be married, in accordance with the laws governing the execution of deeds conveying real estate in the State in which the land is situated, which deed must be recorded in the proper county office and accompanied by a certificate from the recording officer, or a satisfactory abstract showing the title to be clear and free from incumbrance.

5. The affidavit of the applicant must be corroborated by at least two witnesses who have been well acquainted with him for a sufficient length of time to enable them to testify as to the character and reputation of the applicant for truth and veracity. Also, at least one wit-

ness must make affidavit, showing that he has personal knowledge of the facts concerning the alleged mistake, what opportunity he had for learning the facts, and setting out fully all pertinent knowledge he has relative thereto. The witness who testifies as to the facts from his personal knowledge may be one of the witnesses testifying as to the truth and veracity of the applicant.

6. The affidavit of the applicant must be executed before the register or receiver of the land office where the application is made or before a United States Commissioner or commissioner of the court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated, as required by the act of March 4, 1904 (33 Stat., 59). The corroborating affidavits may be made before any officer authorized to administer oaths and using a seal.

7. When an application to amend is filed in your office, you will make proper notations on your records and forward it to the General Land Office with your monthly returns, with your recommendation written at the place indicated in the form, and thereafter you will make no disposition of the land applied for until instructed by the General Land Office.

8. When an application to amend is received in the General Land Office, together with proper report and recommendation from the register and receiver, it will be considered, and, if found satisfactory, the amendment will be allowed and proper correction made on the records, of which you will be duly advised, to the end that the necessary corrections may be made on the records of your office and the applicant properly notified. Where an application is denied, an appeal may be taken to the Department.

9. Where amendments are allowed of claims upon which final proof has been submitted and publication or posting of notice is required, republication of notice applicable to the class of entry for which application to amend is made will be required; and if the land sought by way of amendment is the land originally intended to be entered, the witnesses who testified when the final proof was made on the erroneous entry must make affidavit showing that the land described in the application for amendment is the same land to which they intended to refer in their testimony, formerly given. If, however, the same witnesses can not be secured, or if the land sought by way of amendment is not the land originally intended to be entered, new proof must be made.

10. The act in terms provides for amendment in all cases where an entry, selection, or location has been or shall hereafter be made of a tract of land not intended to be entered, and therefore, perhaps, if strictly construed, provides for amendment only in cases where

there has been a mistake in description of numbers of the land originally intended to be entered. However, under the supervisory authority of the Secretary of the Interior, the Department will allow amendments of entries made under laws which require settlement, cultivation, or improvement of the land entered in cases where, through no fault of the entryman, the land is found to be so unsuitable for the purpose for which it was entered as to make the completion of the entry impracticable if not impossible. In such cases at least one legal subdivision, approximating 40 acres in area, of the land embraced in the original entry shall be retained, and the tracts included by way of amendment must be contiguous thereto. Furthermore, in such cases and as an assurance of good faith, the application to amend must be filed within one year from date of the original entry. Applications for such amendments may be made under the rules given above, and on the prescribed form in so far as the same are applicable. A supplemental affidavit should also be furnished, if necessary, to show the facts.

11. Where entries, selections, or locations are improperly allowed by the land department, as where the lands are not subject to such entries, selections, or locations, amendments will not be allowed because such claims, being invalid, should be canceled, and upon cancellation thereof a new entry, selection, or location may be allowed as though the former had never been made.

The circular of February 29, 1908 (36 L. D., 287), and all other circulars or instructions concerning amendments incompatible herewith are hereby revoked.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

APPLICATION FOR AMENDMENT OF ENTRY, SELECTION, OR LOCATION OF AGRICULTURAL LANDS.

(Approved by the Secretary of the Interior April 22, 1909.)

DEPARTMENT OF THE INTERIOR,

U. S. Land Office at _____.

I, _____, of _____ (give post-office address), having made entry (selection or location) for the _____, section _____, township _____, range _____, _____ meridian (describe former claim by subdivision, section, township, range, and meridian), hereby apply to amend the same so that the description when amended will read as follows: _____, section _____, township _____, range _____, _____ meridian (describe land in above manner); and, being first duly sworn, upon oath say: That I originally intended to enter the _____, section _____, township _____, range _____, _____ meridian (describe lands applicant intended to enter).

I have not sold, assigned, transferred, or relinquished the lands embraced in my said former claim, nor agreed to do so; nor have I taken from said land any timber or other thing of value. (Set out fully below all of the facts showing how the mistake occurred, the precaution taken to avoid error, the grounds upon which the application is based, etc., as required by the regulations.)

I am well acquainted with the character of the land now applied for and with each and every legal subdivision thereof, having passed over each and every legal subdivision thereof, and from my personal knowledge I swear that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or any deposit of coal; nor within the limits of said land any placer, cement, gravel, or other valuable mineral deposit; nor is there any salt spring or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land; and that my application therefor is not for the purpose of fraudulently obtaining title to mineral land; that the land applied for is not occupied nor claimed by any adverse claimant.

The character of the land applied for is as follows: (Describe the character of the land by legal subdivisions and state amount and kind of timber on each subdivision, if any.)

(Sign here with full Christian name.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known, or has been satisfactorily identified before me by _____ (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in _____ (town), _____, _____ (county and State), within the _____ land district, this _____ day of _____, 19____.

(Official designation of officer.)

We, _____ (give full Christian name), of _____ (give full post-office address), _____ years of age, and by occupation _____, and _____ (give full Christian name), of _____ (give full post-office address), _____ years of age, and by occupation _____, do solemnly swear that we have been well acquainted with the above applicant for _____ years and _____ years, respectively; that we have read the statements made by him above; that he is a person of truth and veracity; and we believe said statements to be true.

(Sign here with full Christian name.)

(Sign here with full Christian name.)

I hereby certify that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known, or have been satisfactorily identified before me by _____ (give full name and post-office address); that I verily believe affiants to be credible witnesses and the identical persons hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in _____ (town), _____, _____ (county and State, within the _____ land district, this _____ day of _____, 19—.

_____,
_____,
(Official designation of officer.)

NOTE: In addition to above, an affidavit by at least one witness having personal knowledge of the facts concerning the alleged mistake must be furnished, showing what opportunity he had for learning the facts, and setting out fully all pertinent knowledge he has relative thereto. No form is given for said affidavit.

UNITED STATES LAND OFFICE AT _____,
_____, 19—.

We hereby certify that the foregoing application is for surveyed land and that there is no prior valid adverse right to the same. We recommend that the application be _____.^a

_____, Register.
_____, Receiver.

**SECOND HOMESTEAD UNDER ACT OF APRIL 28, 1904—COMMUTATION
UNDER ACT OF FEBRUARY 8, 1908.**

WILLIAM R. BURKHOLDER.

A second homestead entry made under the act of April 28, 1904, which forbids commutation of entries made thereunder, may be perfected under the act of February 8, 1908, which permits commutation.

*First Assistant Secretary Pierce to the Commissioner of the General
(O. L.) Land Office, May 1, 1909. (C. J. G.)*

An appeal has been filed by William R. Burkholder from the decision of your office of January 26, 1909, sustaining the action of the local officers in rejecting his application to commute under the act of February 8, 1908 (35 Stat., 6), second homestead entry made by him under the act of April 28, 1904 (33 Stat., 527), for the SW. $\frac{1}{4}$, Sec. 4, T. 4 S., R. 18 E., Chamberlain, South Dakota.

March 30, 1901, Burkholder made original homestead entry No. 4051, Sioux series, for lot 2, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 18, T. 106 N., R. 74 W., and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 13, T. 106 N., R. 75 W., which was canceled on relinquishment June 22, 1902.

^a If rejection is recommended, set out reasons therefor.

May 8, 1907, he applied to make second homestead entry for the first described tract under the act of April 28, 1904, alleging that on account of financial loss and an unfavorable season, he was unable to perfect his entry of the second described tract. Said act provides, in part:

That any person who has heretofore made entry under the homestead laws, but who shall show to the satisfaction of the Commissioner of the General Land Office that he was unable to perfect the entry on account of some unavoidable complication of his personal or business affairs, or on account of honest mistake as to the character of the land; that he made a *bona fide* effort to comply with the homestead law, and that he did not relinquish his entry or abandon his claim for a consideration, shall be entitled to the benefit of the homestead laws as though such former entry had not been made. . . .

SEC. 3. That commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this act.

July 18, 1907, it being found that Burkholder alleged facts sufficient to justify the same, your office afforded him the privilege of making second homestead entry under section one of the act of April 28, 1904, which he accordingly exercised July 27, 1907.

November 14, 1908, he applied to commute his said second homestead entry under the act of February 8, 1908, which provides:

That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second homestead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

The application to commute was rejected by the local officers for the reason that Burkholder's second entry, having been made under the provisions of the act of April 28, 1904, the commutation of said entry was prohibited by law. Your office affirmed their action, holding that there was no provision of law under which he could have been allowed to make second entry, except under section one of the act of April 28, 1904, and that there is no provision of law under which he may now be allowed to change his filing so that it will be an entry under the act of February 8, 1908.

The showing made by the applicant, which was found to be sufficient to entitle him to make second entry under the act of April 28, 1904, is also sufficient to bring him within the act of February 8, 1908. The latter act is remedial and its language comprehensive. The entire question hinges upon the expression "shall be entitled to the benefits of the homestead law as though such former entry had not been made." One of the benefits of the homestead law is the right to commute. The applicant here is a person who made a

former entry and lost the same prior to the act of February 8, 1908. He is, therefore, entitled to all the benefits of the homestead law, including the right to commute. Upon showing only that the former entry was not canceled for fraud, or relinquished for a valuable consideration, the act eliminates the consequences of the former entry and confers upon applicant all the benefits of the homestead law, which includes the right to commute.

The act of February 8, 1908, was clearly intended to supersede the act of April 28, 1904, and, the object of the acts being the same, to cover the whole subject matter of second homestead entries. To grant this applicant the benefit of commutation does not involve a change of filing, but merely accords him under a second entry already made the benefit of subsequent legislation on that subject. In other words, the act of 1908 was intended to operate upon all existing unperfected second homestead entries, as well as those made under said act. The word "entry" is not restricted in its meaning, but has been held by the courts to mean the entire proceeding for obtaining title from the government, as well as the first step in such proceeding.

The decision of your office herein is reversed, and the papers are returned for appropriate action.

FEES—CONTEST PROCEEDINGS—REDUCING TESTIMONY.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 1, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Paragraph 9 of the circular of May 16, 1907 (35 L. D., 568, 571), and the circular instructions in modification thereof, dated March 30, 1908, are hereby revoked.

Hereafter, the estimated cost of reducing to writing all the testimony to be taken before the register and receiver in a contest case shall be collected in advance from the contesting parties on the date of the hearing before the hearing is begun, or, under Rule 58 of Practice, the party liable thereto may be required to give security in advance of trial, by deposit, in a reasonable sum or sums, for payment of the cost of transcribing the testimony. Receipts will issue for the amounts collected in accordance with paragraph 6 of the departmental order dated June 1, 1908, embodied in the circular of June 10, 1908 (37 L. D., 46). If any additional amounts above the estimated cost are collected, additional receipts will issue therefor, and

the amounts deposited to the official credit of the receiver, as herein-after directed. Moneys so receipted for will be deposited to the official credit of the Receiver of Public Moneys as "Unearned Fees and Other Trust Funds" and so held until the complete record in the case in connection with which deposited has been transcribed and filed in the local land office, when payment may be made to the contest clerk and the "net balance," exclusive of such payment, deposited to the credit of the Treasurer of the United States, and any excess amount returned to the proper parties. Report will then be made of such collections and expenditures, as heretofore, upon the "Abstract of Collections and Expenditures in Contest Cases" (Form 4-146a).

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

PROCEEDINGS BY GOVERNMENT—INTERVENTION BY STRANGER—PRO-
VISO TO SECTION 7, ACT OF MARCH 3, 1891.

CHANDLER *v.* HAYNES ET AL.

After the expiration of the two-year period fixed by the proviso to section 7 of the act of March 3, 1891, a stranger will not be allowed to intervene and take part as plaintiff in the prosecution of a proceeding commenced by the government within that period.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 3, 1909.* (J. H. T.)

September 25, 1900, Edwin A. Haynes made homestead entry No. 13068, Oregon City series, now 0890 Portland series, for lots 23 and 24 and S. $\frac{1}{2}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 17, S. $\frac{1}{2}$ SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 18, T. 9 S., R. 10 W., in the former Siletz Indian reservation, and the same was commuted to cash entry No. 7310 on March 7, 1902.

All the entries in the said former reservation were suspended by your order of March 25, 1903, and on March 26, 1903, you directed a special agent to make an investigation of all entries within the said area.

November 4, 1903, Special Agent A. J. Hobbs telegraphed your office requesting that no patents be issued for lands within said area. November 7, 1903, the said special agent made written report sending list of entries and stating that the said entryman Haynes mortgaged his land to Neff and Son on March 6, 1902; that he had reliable information that said entry and others were not made in good

faith but were made in the interest of other parties; that it was the general rumor that the entrymen mentioned in the list never complied with the homestead law, and he requested that no patents issue pending further investigation. This report was sufficient itself to prevent the running of the statute.

November 28, 1908, Special Agent H. T. Jones made a report against the said entry, wherein it is alleged that said entryman did not reside upon, cultivate, or improve the same in good faith, and that the residence of entryman on said land consisted of infrequent visits of short duration.

July 10, 1908, the local office transmitted a duly corroborated affidavit of contest by Arthur E. Chandler against the said entry, and by your letter of December 22, 1908, Chandler was allowed to intervene in the case, and the local officers were directed that in the event he failed to avail himself of the privilege, they should proceed against the entry upon the special agent's charges.

George L. Neff, transferee, filed a motion to dismiss the proceedings against the entry, and requested that patent issue under the proviso to section 7 of the act of March 3, 1891. The said motion was denied by your decision of March 8, 1909, whereupon Neff has appealed.

One of the errors assigned by appellant is that the report of Special Agent Hobbs was not sufficient to prevent the running of the statute, and that the report of Special Agent Jones sets up new matter which is not allowable after the expiration of the two-year period.

The preliminary action taken by the government regarding entries in the said former reservation affected all entries therein, and the said orders as recited above are the same in this case as appear in the case of George Rilea *et al.*, decided by the Department April 30, 1909, wherein it was held that the order directing investigation within the two-year period prevented the running of the statute. For the reasons therein stated, it is held in this case that the said statute was prevented from running, irrespective of the said agents' reports.

Your action in allowing intervention by Chandler was based on the ruling in the case of John N. Dickerson (35 L. D., 67), and circular "P" of April 24, 1907. The said circular, however, was revoked by order approved March 22, 1909.

It was stated in the case of Milroy *v.* Jones (36 L. D., 438) that:

The government may avail itself of the services of an individual in the prosecution of proceedings commenced by it within the statutory period, but no right is acquired or conferred by reason of said assistance except such as accrues to the public generally by the restoration of public lands to entry.

However, it is not believed that any good purpose can be served by allowing a stranger to intervene and take part as plaintiff after the lapse of the two-year period at a time when he can not under the law

gain a preference right of entry. He might by such action incidentally gain an advantage over other applicants by being thus placed in a position to receive notice of the cancellation of the entry under attack in advance of the general public. Such intervention also complicates proceedings and leads to confusion. Good practice requires that the Government proceed in such cases solely in its own name and in furtherance of its action begun within the two-year period.

It is not necessary that the charge be formulated within two years from the date of issuance of the final receipt. As was stated in the case of John L. Maginnis (33 L. D., 306):

Any proceeding by the government challenging the validity of any particular entry, or any investigation initiated because of the supposed invalidity of such entry, before the lapse of two years from the date of final certificate, is effective to take the entry out of the confirmatory operation of the proviso to section 7 of the act of March 3, 1891.

See also case of Cora M. Bassett *et al.* (37 L. D., 167) and Menasha Wooden Ware Company, assignee of William Gribble (37 L. D., 329).

In this case the action of the government had prevented the running of the statute. Hearing should be ordered upon the charges of the special agent.

The application of Chandler to be allowed to intervene is denied. Your decision is modified accordingly.

CHIPPEWA LANDS—EXCHANGE OF ALLOTMENTS—SECTION 3, ACT OF
MAY 23, 1908.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 3, 1909.

REGISTER AND RECEIVER,
Cass Lake, Minnesota.

SIRS: Your attention is invited to the provisions of section 3 of the act of May 23, 1908 (35 Stat., 268), which reads as follows:

That any Indian having an allotment within the limits of the National Forest created by this act is hereby authorized to relinquish such allotment and permitted to take another allotment in lieu thereof outside such National Forest, under the direction of the Secretary of the Interior; and the allotments of any deceased Indians located within the boundaries of said National Forest shall not hereafter be disposed of under section seven of the act of June twenty-seventh, nineteen hundred and two (volume thirty-second Statutes at Large, page two hundred and forty-five); but the heirs of said deceased Indians shall have the right, with the consent of the Secretary of the Interior and under such rules as he may prescribe, to relinquish to the United States the lands covered

by such allotments and to select surveyed, unappropriated, unreserved land within the limits of any of the ceded Indian lands in the State of Minnesota and outside of the National Forest hereby created in lieu of the land covered by such allotments; and the lands so relinquished by the Indians or their heirs shall thereupon become part of the said National Forest.

1. Under this law any Indian having an allotment of lands inside the National forest created by said act will be allowed to relinquish the same and take in lieu thereof an allotment of lands of like character outside of such National forest; that is to say, lands classified as "agricultural lands," may be taken in lieu of "agricultural lands," and "pine lands" may be exchanged for either "agricultural" or "pine" lands, but only for "pine lands" when the amount of pine timber standing on both tracts is approximately the same.

Such showing must be made in each case as will satisfy the Superintendent of Leech Lake Agency of the character of the land, and he will submit with his report the papers and facts upon which he bases his recommendation for a change of allotment.

2. Should an Indian desire to exchange his allotment under the law quoted to include land classified as pine, where the timber has not been sold, and rule 1 is not applicable, he may do so, subject to the right of a future purchaser to remove the timber prior to July 1, 1912, and in such case the Indian will not be required to remove to the new allotment prior to the removal of the timber.

3. Should an Indian desire to exchange his allotment under said law to include lands classified as pine, where the timber has been sold, he may do so, subject to the right of the purchaser to remove the timber prior to July 1, 1912, and in such case the Indian will not be required to remove to the new allotment prior to the removal of the timber.

4. Under this law an Indian may take his allotment on any of the ceded Chippewa reservations, on lands subject to allotment, without being restricted to the reservation on which his present allotment is located.

5. The foregoing rules will apply to an exchange of allotment by the heirs of a deceased allottee under the act.

6. The Commissioner of Indian Affairs and Superintendent of Leech Lake Agency will be furnished a copy of this letter for their information and guidance.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

R. A. BALLINGER, *Secretary.*

RAILROAD GRANT—ADJUSTMENT—SELECTION OF LANDS IN ABANDONED MILITARY RESERVATION—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO.

Congress having by the acts of July 5, 1884, and August 23, 1894, provided a special and exclusive mode for the disposal of lands in abandoned military reservations, such lands are not subject to selection by the Northern Pacific Railway Company under the act of July 1, 1898.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 3, 1909. (F. W. C.)

This is a motion on behalf of the Northern Pacific Railway Company for review of departmental decision of February 27, 1909 (not reported), affirming your office decision of June 6, 1908, holding for cancellation a list of selections filed by said company under the act of July 1, 1898 (30 Stat., 597, 620), as to the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 136 N., R. 59 W., Bismarck land district, North Dakota, because said tract is a part of the former Fort Rice military reservation.

The action of your office, and that of the Department in affirmance thereof, was put upon the ground that as the lands applied for are part of an abandoned military reservation restored for disposition under and in accordance with the provisions of the acts of July 5, 1884 (23 Stat., 103), and August 23, 1894 (28 Stat., 491), it was subject to disposition only as provided for in those acts and was not therefore subject to selection by the railway company under the act of July 1, 1898.

The motion for review earnestly questions the correctness of this conclusion and urges that it is in conflict with departmental decision of January 23, 1909, in the matter of certain selections made by said company from lands restored to the public domain by the act of May 1, 1888 (25 Stat., 133), the same being a portion of the land ceded by the Gros Ventre and other Indians.

The question as to the status of lands in abandoned military reservations was fully considered in the case of State of Utah (30 L. D., 301). In that case the State sought to make selection of certain lands within the abandoned Fort Crittenden military reservation under its grant made by the act of July 16, 1894 (28 Stat., 107), for the establishment and maintenance of an institution for the blind, which grant was to be satisfied by selections made "from unappropriated public lands" within said State. In denying the claimed right of the State to resort to said land in the satisfaction of its grant, it was said:

The acts of July 5, 1884, and August 23, 1894, are of restricted application and relate only to abandoned military reservations. Congress could have directed that upon the abandonment of a military reservation, the lands embraced therein should be restored to the public domain for disposition generally under the land laws, or should be subjected to disposition only in a designated mode.

The latter course was adopted. The act of July 5, 1884, directed that whenever, in the opinion of the President, any lands within any military reservation had or should become useless for military purposes he should cause the same to be placed under the control of the Secretary of the Interior "for disposition as hereinafter provided." Then followed provisions for the survey, appraisalment, and disposition of the lands. The act of August 23, 1894, extended the mode of disposing of the lands embraced in a certain class of abandoned military reservations, including the one under consideration, by also subjecting them to the settlement laws, meaning thereby the homestead and townsite laws (29 L. D., 505), but the policy of the prior act of securing to the government the benefit of any enhancement in value of the lands resulting from their former use was adhered to, it being provided:

"That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisalment, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior."

It does not appear to have been the purpose of the act of August 23, 1894, to repeal the act of July 5, 1884, or to wholly supersede it as to any abandoned military reservation, but rather to enlarge the authorized mode of disposing of the public lands within abandoned military reservations of the class described in the later act, and when the two acts are construed together, as they must be, it is plain that it was the purpose of Congress to provide in said acts an exclusive mode for the disposition of the public lands within abandoned military reservations. The two acts must be read as though all of their provisions were embraced in one act of the later date, and when so read we have a statute which among its earlier provisions declares that lands within abandoned military reservations shall be placed in the control of the Secretary of the Interior "for disposition as hereinafter provided," and then specifies the methods of disposition intended. These do not include selections of lands by a State in satisfaction of a grant in quantity and without location. Because of the enhanced value of lands in abandoned military reservations, or because of other reasons growing out of their former use and surroundings, it was deemed more conducive to the public interests to set them apart for disposition in certain designated modes, to the exclusion of all others, than to unconditionally restore them to the public domain. (See case of *R. M. Snyder*, 27 L. D., 82.) In this sense they are appropriated—not disposed of in the sense of sold or its equivalent, but set apart for disposition in a particular manner in pursuance of a defined policy. This appropriation does not place the lands beyond the power of other disposition by Congress, but, so long as it stands, unaltered, controls the Secretary of the Interior under whose direction the State selections in question must be made.

The act of July 1, 1898, *supra*, under which the selection in question was made, provides for the adjustment of conflicting claims within the limits of the Northern Pacific railroad grant by extending to the claimant, as against the grant, the privilege of an election to either retain the lands claimed or transfer the claim to other lands without the grant, and in the event the claimant elects to retain the lands within the grant, the railroad company, upon making relinquishment of such lands, is to be entitled—

to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron,

or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted.

I find nothing in the act of 1898, *supra*, indicating a change of policy respecting the disposal of lands within abandoned military reservations or indicating a purpose to subject those lands to selection under said act. It is undoubtedly true that these lands are no longer reserved in the technical meaning of that term. The very purpose of the acts of 1884 and 1894, before referred to, was to relieve them from that technical condition; nevertheless, the limitations upon their disposition imposed by said acts, especially in view of the fact that the homesteader is required in making title thereto to pay the appraised price of the lands, clearly reserve them as against selection of the character provided for in the act of 1898, under which the company is asserting claim.

With respect to departmental decision of January 23 last, involving certain former Indian lands restored to the public domain by the act of May 1, 1888, *supra*, it is sufficient to say that none of the considerations influencing the limitations upon the disposition of lands formerly within abandoned military reservations, found in the acts of 1884 and 1894, was present, nor was the legislation of 1888 of the same restrictive character. It follows that said decision is in nowise controlling with regard to the disposition of the lands here in question.

The previous decision of the Department denying the right of the company to make selection of these lands is adhered to, and the motion for review is denied.

MILLER *v.* NORTHERN PACIFIC RY. CO.

Motion for review of departmental decision of June 17, 1908, 36 L. D., 526, denied by First Assistant Secretary Pierce, May 4, 1909.

FOREST RESERVE LIEU SELECTION—VACANT LAND—PATENT.

SANTA FE PACIFIC R. R. CO. *v.* NORTHERN PACIFIC RY. CO.

The word "vacant" in the act of June 6, 1900, which declares that only "vacant surveyed nonmineral public lands which are subject to homestead entry" may be selected under the act of June 4, 1897, contemplates not only land which is not occupied, but also land which is not appropriated, not reserved, and for which no claim has been presented under any of the laws providing for the disposition of the public domain.

The land department is not bound under the broad principles announced in the decision of the supreme court in the case of *Sjoli v. Dreschel* to allow a selection under the act of June 4, 1897, for land embraced in a prior railroad indemnity selection, merely because at the time of the presentation of such selection the railroad selection had not been approved.

The mere fact that patent was erroneously issued upon a railroad indemnity selection without awaiting the expiration of the period within which an applicant to select the same land under the act of June 4, 1897, was entitled under the Rules of Practice to appeal from the rejection of such application, will not warrant the institution of suit to vacate the patent, where it appears the patentee is entitled to the land and cancellation of the patent would have to be followed by the issuance of a new patent to the same patentee.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 4, 1909.* (S. W. W.)

The Santa Fe Pacific Railroad Company has appealed from your office decision of November 4, 1908, rejecting its applications to select under the act of June 4, 1897 (30 Stat., 11), the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 3, T. 54 N., R. 13 W., Duluth, Minnesota, land district.

The record shows that said lands were selected October 17, 1883, as second indemnity by the Northern Pacific Railroad Company under the provisions of the joint resolution of 1870; that such selection was held for cancellation by your office August 15, 1901, because of invalidity of base, upon which valid base was assigned by the company March 13, 1906, and the selections approved by the Department December 10, 1906, and patent issued February 13, 1907.

In the meantime, namely, on October 10, 1906, the Santa Fe Pacific Railroad Company filed its application to select said lands under the act of 1897, *supra*, in lieu of an equal quantity of land within the San Francisco Mountains Forest Reserve, which application was rejected by the register and receiver, and an appeal having been taken to your office, the action of the local office was affirmed by your said decision of November 4, 1908, which held that the lands were not subject to selection by the Santa Fe Pacific Company because at the time such application was presented valid bases had been assigned by the Northern Pacific Railway Company in support of its selection, and that, patent having issued, the land department had no further jurisdiction over the matter.

The appeal is based upon the following grounds: First, that the selections proffered by the Northern Pacific Railway Company in 1883 were void *ab initio* and could not operate to defeat the selection of the land by the Santa Fe Pacific Railroad Company; second, that notwithstanding the rejection of the Santa Fe Pacific Company's application by the register and receiver, said company under the rules of practice had the right to appeal from that action to your office and the further right to appeal from your office decision to the Department; that pending the exercise of that right and within the time allowed therefor, no disposition should have been made of the land; and that the patent was erroneously issued and the Depart-

ment should recommend the institution of a suit looking to its annulment.

The appellant contends that under the decision of the Supreme Court in the case of *Sjoli v. Dreschel* (199 U. S., 564), the indemnity selection of the land by the Northern Pacific Company did not operate as a segregation thereof so as to prevent its selection by the Santa Fe Pacific Company under the act of 1897, *supra*, and that patent having been erroneously issued to the Northern Pacific Company, suit should be instituted looking to the annulment of the patent upon the ground of mistake, the case of *Germania Iron Company v. United States* (165 U. S., 379), being cited in support of this contention.

While it is true that upon the issue of patent the land department was divested of jurisdiction over the land, in view of the appellant's contentions it is deemed proper in disposing of this appeal to consider the respective merits of the conflicting claims.

The act of June 6, 1900 (31 Stat., 588, 614), declares that the selections authorized by the act of 1897, *supra*, shall be confined to "vacant, surveyed non-mineral public lands which are subject to homestead entry." While the term "vacant" ordinarily means "unoccupied," in the nomenclature of the land department it has a much broader significance, and the expression "vacant land" includes not only land which is not occupied, but also land which is not appropriated, not reserved, and indeed, land for which no claim has been presented under any of the laws providing for the disposition of the public domain.

Numerous laws have been passed by Congress from time to time providing for the disposal of the public lands, under some of which the lands may be purchased outright and the certificate of patent received immediately upon payment. Under other laws certain preliminary action is required, to be followed by intermediate action and perhaps later by final action on the part of the applicant and the various officers of the land department before the right to receive a patent becomes vested.

The orderly administration of such divers laws has rendered it absolutely necessary for the land department, whose duty it is to administer such laws, to prepare rules and regulations governing applicants in their proceedings to acquire title and also governing the subordinate branches of the Department in carrying the laws into effect.

Considerable difficulty having been experienced in disposing of conflicting claims presented for the same tract of land before the Department could finally dispose of other claims of record, rendered it necessary to issue a positive definite rule respecting this matter. The rule now in force and the one obtaining at the time the applica-

tions in question were presented is contained in 29 L. D., at page 29, and provides that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been canceled upon the records of the local office. The term "entry" as used in these regulations has been uniformly held to include also any *bona fide* selection or application to locate.

It is true that the Supreme Court in the case of *Sjoli v. Dreschel*, *supra*, held broadly that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections have been made by it, with the approval of the Secretary of the Interior, and that up to the time of such approval lands within indemnity limits, although embraced within the company's selections, are subject to be disposed of by the United States or to be settled upon and occupied under the preemption and homestead laws. Statements made by the court in that case appearing to be broader than were necessary to a disposition of the particular matter involved, this Department requested of the Attorney-General an opinion as to whether or not in its administration of the public land laws it was bound to follow the broad principles quoted by the court in the case of *Sjoli v. Dreschel*.

In his opinion of June 18, 1906 (35 L. D., 77; 25 Opinions of Attorney-General, 632), the Attorney-General held that in the administration of the several land grants to railroads the Secretary of the Interior was not bound to follow the broad principles announced by the court in the case of *Sjoli v. Dreschel*, but might properly confine what was said therein to a state of facts similar to those then before the court.

Examining the case of *Sjoli v. Dreschel*, it will be seen that the company's selection was presented in 1885, and that at that time the land was occupied by a qualified homestead settler, who had located upon the land the preceding year. The court accordingly held that such settler was properly allowed to enter the land in 1889, notwithstanding the intervening selection proffered by the company. In attempting to apply the rule announced in that case, it is at once apparent that the case at bar presents no such state of facts, because at the time of the presentation of the Santa Fe Pacific Company's selection, the land was embraced in the indemnity selection of the Northern Pacific Company, for which valid bases had been assigned, and such land, therefore, was not, within the meaning of the act of 1897, as amended by the act of 1900, *supra*, "vacant public land subject to homestead entry." Merely because the Supreme Court held in the case of *Sjoli v. Dreschel* that the land department properly allowed a qualified settler to enter land embraced in an indemnity selection,

it by no means follows that a lieu selection under the act of 1897, should be allowed to defeat a prior valid indemnity selection.

As stated by the Attorney-General in his opinion cited above, this Department is not bound to apply the broad principles announced by the Supreme Court to every case that may appear before it, but should apply the rule only in those cases where the facts are similar. The Supreme Court has expressly held that where statements occur in decisions which are not essential to the decision, they are not authoritative and are not binding. See *Wisconsin Central Railroad Company v. Price County* (133 U. S., 509).

It is true that the Government might properly institute a suit to set aside a patent issued by mistake as was done in this case. However, in the case cited by the counsel for the Santa Fe Pacific Company (165 U. S., 379), it seems that the suit was not instituted merely because patent was issued in violation of certain rules, because upon the cancellation of that patent the land was patented to other parties. See *Midway Company v. Eaton* (183 U. S., 602).

This Department has decided that the United States should not attack its own patent regularly issued without a clear, convincing showing that fraud was committed in procuring its issuance (21 L. D., 125), and that a suit may be brought by the United States in any court of competent jurisdiction to set aside or annul a patent for lands issued in its name on the ground that it was obtained by fraud or mistake, but that the right to bring such a suit exists only where the Government has an interest in the remedy sought by reason of its interest in the land, or when the fraud has been practiced on the Government and operates to its prejudice, or the Government is under obligation to some individual to make his title good by setting aside the fraudulent patent or where the duty of the Government to the people requires such action. (21 L. D., 179.) Moreover, the Supreme Court of the United States has decided that when it is apparent that the only purpose for bringing the suit to cancel the patent is to benefit one of two claimants to the land, and the Government has no interest in the matter, the suit must fail. *U. S. v. San Jacinto Tin Company* (125 U. S., 273).

While, as indicated, the patent was irregular in this case, because no action looking to a final disposition of the land should have been taken pending the right of appeal by the adverse claimant, still as it is believed that the Northern Pacific Company was entitled to the land, it would be futile to recommend the institution of suit to cancel a patent which, if canceled, this Department would order to be reissued after a thorough consideration of the conflicting claims for the land.

Your office decision is accordingly affirmed.

ATTORNEY—AUTHORITY TO ACT—SOLDIERS' ADDITIONAL RIGHTS.

HENRY N. COPP.

The fact that an intermediate assignor of soldiers' additional rights guarantees the same, is not sufficient reason for recognizing him as attorney for applicants to locate such rights, unless an appearance is filed in each case showing authority to represent some party in interest therein.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 4, 1909.* (G. B. G.)

This is the appeal of Henry N. Copp forwarded with your letter of September 14, 1908, from a ruling of your office declining to recognize him as attorney in cases of soldiers' additional homestead applications before your office unless an appearance is filed in each case reciting that the party entering appearance is authorized to represent some person who is recognized as a party in interest in the case.

Mr. Copp contends, that inasmuch as he was an intermediate owner of certain soldiers' additional scrip rights, and having sold the same under a guarantee in each case that he had not exercised the right and was the *bona fide* holder and owner thereof at the time of making the assignment, he has such interest in the scrip as authorizes him under a general appearance to represent the present claimant.

The Department is not disposed to interfere with the ruling of your office with reference to this matter. The fact that the intermediate assignor guarantees the scrip is not sufficient reason why he should be permitted to represent the claimant before your office. He has no real interest in the scrip and the owner thereof may desire to employ other counsel.

The action of your office is approved and affirmed.

MILL SITE—CONTIGUITY TO MINING CLAIM—SECTION 2337, R. S.

YANKEE MILL SITE.

The provision of section 2337, Revised Statutes, whereunder only "non-mineral land, not contiguous to the vein or lode," may be acquired for mining or milling purposes in connection with a lode mining claim, is intended to prevent the appropriation, within the mill-site area, of a further segment of the actual mineral vein or lode upon which the mining claim itself is predicated; and a mill-site not contiguous to the vein or lode, embracing only non-mineral land, is not objectionable merely because in contact with a side line of the lode claim.

Alaska Copper Company, 32 L. D., 128, in part, and Brick Pomeroy Mill Site, 34 L. D., 320, overruled.

*First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) Land Office, May 5, 1909. (F. H. B.)*

The entry of True Blake and Dennis Blake, made January 13, 1908, for the Yankee group of lode mining claims and the Yankee mill-site, survey No. 2267 A & B, Coeur d'Alene, Idaho, land district, is held for cancellation, to the extent of the mill-site, by your office decision of August 8, 1908; hence the pending appeal.

The mining claims embraced in the group are the Yankee, Sherman, Cleaveland, and Norcross, and in this order they range approximately from east to west; the Yankee claim, it appears, resting upon the slope of a hill, and the Norcross, at the opposite end of the group, reaching the flat below. One boundary line of the mill-site is coincidental with the northerly side line of the Norcross claim (which is fractional), and it is because of the contiguity or contact that, upon authority of the case of Brick Pomeroy Mill Site (34 L. D., 320), the cancellation is adjudged, as above.

The brief of the appellants challenges directly and generally the ruling upon which the judgment of your office is entered; and in the light of the record by which its attention is again directed to the question, the Department is now constrained to reverse the ruling.

It appears that the mining claims cover a continuing vein or lode; and it is averred by the appellants, and nothing otherwise is disclosed to contradict it, not only that the group is a producing mine, from which ore is at present shipped, but that for four or five years past the mill-site has been actually used for mining and milling purposes in connection with the group of claims. As to the topography involved and in all other evident respects, it must be admitted, the mill-site is most advantageously situated for those purposes.

For convenient reference those provisions of section 2337, Revised Statutes, under which this case arises, are here quoted:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode.

In the case of Alaska Copper Company (32 L. D., 128) the question of contiguity was presented, in a somewhat aggravated form, as the diagram therewith discloses. It was there briefly said (p. 131):

A further and equally fatal objection to the entry, with respect to the mill-site claims, lies in the fact that these claims are contiguous, as a group, to the group of lode claims with which they are claimed. The statute in terms per-

mits only "non-mineral land, *not contiguous* to the vein or lode," to be appropriated for mill-site purposes, and only "such *non-adjacent* surface ground" to be embraced and included in an application for patent for the lode claim, and limits the area of "such *non-adjacent* land" to five acres. These terms are too plain to invite discussion. In this case the lode and mill-site claims form one continuous, uninterrupted group, in manifest contravention of the plain terms of the statute.

But in the case of Brick Pomeroy Mill Site, *supra*, the question was discussed at length, and it was held, as expressed in the syllabus, that the words "vein or lode" in section 2337 "are not used in the restricted sense of indicating a body of mineral, or mineral-bearing rock, in place, only, but are used in the larger sense of designating a located vein or lode *claim*, and that only non-mineral land not contiguous to a vein or lode *claim* may be appropriated for mill-site purposes."

It is obviously true that exclusively throughout the section the phrase employed is "vein or lode," and it may be observed that the section is taken from the general mining act of May 10, 1872 (17 Stat., 91), which provided for the location of a tract or piece of land, to be defined by surface boundaries, respectively designated as side lines and end lines, and embracing the mineral vein or lode itself at its apex, as the mining claim. But, whilst from the text-proof the conclusion of the Alaska Copper Company and Brick Pomeroy cases would readily follow, it is reasonable to urge that those decisions left out of view the historical basis of all the mining legislation and in that way the purpose which may naturally be ascribed to it in this instance. Prior to the act of 1872, and under the law of 1866 (14 Stat., 251), the miner located the lode itself, "together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules." In that particular the characteristics of those early locations were thus remarked by the court in *Del Monte Mining Co. v. Last Chance Mining Co.* (171 U. S., 55, 64):

As might be expected, the patents issued under this statute described surface areas very different and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, following, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area.

Whilst, therefore, the act of 1872 made a radical change in the matter of the location, it would be evident, if for no other reason, that the former conditions were then fully in the mind of Congress, from the provision inserted in the concluding section, "that nothing contained in this act shall be construed to impair, in any way, rights or

interests in mining property acquired under existing laws." So, too, section 2328, Revised Statutes, also taken from the act of 1872, provides:

Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

It seems to the Department, upon further consideration, to be but a logical conclusion, that when by the act of 1872, whereunder a definite superficial area was made available in the case of every lode mining location, a new provision for an additional area, "for mining or milling purposes," was made, with a limitation by acreage and not by dimensions, the prohibition in that connection against the contiguity of the so-called mill-site with "the vein or lode" was intended, in the light of the previously existing practice, to prevent the appropriation within any such area of a further segment of the actual vein or lode upon which the mining claim itself was to be predicated. In this view, it is in that sense that "the vein or lode" as first used in section 2337 would be taken; and it would follow that, if not so contiguous and if in fact embracing only non-mineral land, a mill-site in contact with the side line of a lode claim would be unobjectionable.

Without attempting further discussion, the Department so decides; and the above-quoted portion of the decision in the case of Alaska Copper Company, in so far as it is applicable to such side-line contacts, and the decision in the case of Brick Pomeroy Mill Site, *supra*, are accordingly overruled.

The decision of your office is therefore reversed, and the entry will be approved intact and passed to patent in the absence of objection otherwise.

ALIENATION—HOMESTEAD ENTRY—CONTRACT TO CONVEY.

BLANCHARD *v.* BUTLER.

Where one is induced by another to contract for disposal of a part of a homestead entry, ignorant of any violation of law, but on learning the illegality of the contract voluntarily rescinds it, the entry will not be canceled on a contest charging such fraudulent contract, instituted by the party who induced it.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 7, 1909.* (J. R. W.)

Neri W. Butler appealed from your decision of November 28, 1908, canceling his homestead entry for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 16, T. 8 N., R. 42 E., Blackfoot, Idaho.

May 6, 1902, Butler made entry, and July 9, 1907, submitted final proof, on which final certificate issued July 23, 1907. February 8, 1908, Alma M. Blanchard filed contest affidavit, alleging that May 29, 1902, Butler made a written contract with one A. M. Blanchard, in consideration of \$150, to help pay Frank Hale, for relinquishment of a prior homestead entry, and Blanchard's promise to pay the proving-up expenses, Butler would after final proof convey to Blanchard the north half of the entry and vacate the house and outbuildings. April 6, 1908, both parties, with counsel, submitted testimony before a United States commisisoner. April 16, 1908, the local office found the entryman entered into such a contract without knowledge of its effect, and that since he learned its illegality he had no intent to perform it, but tendered to pay the money advanced, with interest, and recommended dismissal of the contest.

You found there was no question as to Butler's good faith in residence and improvement, and that since final proof he continued both residence and improvement; that the land was covered by Hale's former entry, relinquished May 6, 1902, and contestant is the party with whom Butler made the contract alleged, the original of which was introduced in evidence. You reviewed the evidence at length, and held that:

Under the provisions of Sec. 2296, R. S., specific performance of the contract to convey could not be enforced, but such fact would not relieve the entryman of the consequences of his unlawful act under the authorities. *Crawford v. Study* (26 L. D., 708); *Walker v. Clayton* (24 L. D., 79); *Molinari v. Scolary* (15 L. D., 201). Blanchard being party to the illegal contract can not profit thereby, and he can not be awarded a preference right. *Tipton v. Maloney* (23 L. D., 186). The entry is hereby held for cancellation.

It appears that the contract of Blanchard with Butler was not merely written, but was suggested and devised by Blanchard. When Butler first learned that Hale's relinquishment could be purchased he applied for loan of \$150 of Blanchard, who, though able to lend, refused, and later proposed and drew the contract. He devised the fraud, and Butler seems to have been in fact ignorant that the contract violated the law, though knowledge is by policy of law imputed to him. The evidence shows the contract was not consummated, but remained merely executory, and that when Blanchard told Butler their contract was illegal and involved forfeiture of the entry, Butler determined not to perform it and applied to repay the money advanced, with interest, which Blanchard refused, saying he wanted the land. The question thus presented is, whether one who is unwittingly inveigled into such a contract must be punished by forfeiture of the entry, though he repudiates the contract and offers full equitable compensation for its consideration as soon as its illegal character is known to him.

The Supreme Court, in *Thomas v. City of Richmond* (12 Wall., 349, 355), discussing the effect of illegal contracts and their effect upon property involved, quotes with approval Mr. Frere's note to Lord Mansfield's decision in *Smith v. Bromley* (2 Douglas, 696), that:

A recovery may be had and received where the illegality consists in the contract itself, and that contract is not executed—in such case there is a *locus penitentiae*, the *delictum* is incomplete and the contract may be rescinded by either party.

The same court in *Spring Company v. Knowlton* (103 U. S., 58, 60) says:

Mr. Parsons in his work on contracts, Vol. II, p. 746, says: "All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality, or public policy, are void, so he who advances money in consideration of promise, or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money."

To the same effect, see 2 Addison, Contracts, Sec. 1412; Chitty, Contracts, 944; 2 Story, Contracts, Sec. 617; 2 Greenl'f, Evid., Sec. 111 . . . We think it fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances the rule that would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

Upon such authority it is clear that were the case turned about, and Blanchard, who devised, drew the contract, and now insists upon a forfeiture of the entry because of it, were the rescinding party suing Butler for the money advanced, the courts would be compelled to give him a judgment. It is difficult to see any sound principle upon which right of rescission can be justly denied to Butler, the seduced and less guilty party.

Viewed also from the purpose of the provision in the homestead act prohibiting contracts of this kind, it is apparent that recognition of the right of rescission is in furtherance of the purpose of the act. To refuse it and close the door of repentance to one ignorantly making such contract is to put him under heavy bond to be silent, abide, and perform it. Had Butler in this case done that, Blanchard would have accomplished his fraud and obtained title to half the land. But, if rescission by one ignorantly drawn into such a contract avoids the forfeiture, check is put on the evil practice by warning scheming persons that their seduced victims are not under bond to perform and may repudiate the contract without loss of their homes and improvements.

The decision in *Crawford v. Study* (26 L. D., 708) is not in conflict with this ruling, when the facts therein are considered. The entry was made under a deliberate prior arrangement for a speculative townsite scheme, and he admitted he meant to carry it out just as it was. There was no repentance before failure of the townsite scheme made performance impossible. He was not seeking the land for a home, but for quick profits through an intended townsite venture. In *Walker v. Clayton* (24 L. D., 79) the entryman himself devised the violation of law and even concealed from his vendee the fact that the land was yet public. *Molinari v. Scolary* (15 L. D., 201) and *Tagg v. Jensen* (16 L. D., 113) were cases of voluntary and fully understood fraudulent combination to make entry for joint profit. *La Bolt v. Robinson* (3 L. D., 488) was similar, but differed in that the entryman, Robinson, was the mere employe of Reed, who was to have the whole entry on payment of \$150 for Robinson's service, which arrangement was adhered to until six weeks before final proof, when it was attempted to be rescinded under pressure of La Bolt's intervening settlement and declaratory statement. *Palmer v. Stillman* (18 L. D., 196) was a case of sale and delivery of possession of a timber culture entry made before final proof, observed by both parties for five years with intent to consummate it by a deed as soon as title could be secured and not attempted to be rescinded until two months after contest by Palmer. All such decisions, when the facts are considered, were proper determinations of the cases in which they were made.

The present case is essentially different. The entryman having insufficient money to buy the relinquishment of a tract he desired in good faith for a home, was seduced by his present adversary into a contract to convey the better half to him when final proof should be made. The seducer knew the contract was illegal. Upon being informed that it was illegal, the victim rescinded and offered to pay all money advanced and ample interest. Blanchard insisted that he wanted the land. There is not a doubt of Butler's settlement with intent to acquire a home, or of full compliance with the law, except the infraction by his contract made ignorantly and rescinded when informed of its character. Adapting to the case the words of the court in *Spring Company v. Knowlton*, *supra*, the rule to impose forfeiture in such case "would be a very harsh one, not founded on any law or public policy." Where a party acting in good faith with intent to acquire a home has inadvertently or through false suggestion made a contract of this kind and voluntarily rescinds it, under no pressure of contest or adverse claim, moved solely by desire to comply with the law, it is against public policy to impose a forfeiture, thus binding him to abide his illegal contract.

This contest is dismissed and Butler's entry will remain intact.

NONMINERAL APPLICATIONS FOR LANDS WITHDRAWN OR CLASSIFIED AS COAL.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 8, 1909.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is directed to paragraph 13 of circular approved April 10, 1909 (37 L. D., 653), "Regulations Regarding the Classification and Valuation of Coal Lands:"

(13) Except in case of entries now pending, or entries made prior to classification, review of classification or valuation may be had only upon application therefor to the Secretary, accompanied by a showing clearly and specifically setting forth conditions not existing or known at the time of examination.

1. You will accordingly advise any person presenting a nonmineral application or filing for lands, classified in schedules and maps as containing workable deposits of coal subject to disposal at prices fixed, that he may submit such evidence as he can, preferably the sworn statements of experts or practical miners, showing that the land is in fact not coal in character, together with a request that the particular lands be reclassified. Such applications and the accompanying proofs will be given proper serial numbers, and notation of the same will be made upon the records and the papers forwarded to the General Land Office for action. If reclassification be denied, the claimant may, within thirty days from receipt of notice of the rejection of his application therefor, apply for a hearing to overthrow the existing classification, at which he must assume the burden of proof. If he fails so to apply, his application to enter or file will stand rejected, and the case will be noted as closed.

2. Lands noted on your records as "temporarily withdrawn from all entry" are absolutely withdrawn until you are furnished in regular course with the maps and schedules showing the classification thereof. Thereupon, such lands, if classified as coal, will be subject to paragraph *one* hereof as regards nonmineral applications.

3. Lands noted on your records merely as "withdrawn" coal lands may be entered as provided by the last sentence of paragraph *two* of the circular of April 24, 1907 (35 L. D., 681).

The instructions of April 24, 1907, are modified accordingly.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved May 8, 1909.

FRANK PIERCE, *Acting Secretary.*

EXTENSION OF TIME FOR RECLAMATION PROJECTS UNDER CAREY ACT.

INSTRUCTIONS.

Instructions governing the extension of time for irrigation and reclamation plants, under section 4 of the act of August 18, 1894, as amended by section 3 of the act of March 3, 1901.

Secretary Ballinger to the Commissioner of the General Land Office,
May 13, 1909. (E. C. F.)

Referring to that portion of the act of Congress, above cited [31 Stat., 1188], which authorizes the Secretary of the Interior in his discretion to continue segregation of lands for a period of not exceeding five years, or to restore them to the public domain, where a State has failed to reclaim lands segregated under the Carey Act within the period of ten years, prescribed by law, you are advised that all such applications must be submitted to me with your report and recommendation, and applications for extension of time will only be entertained upon a showing of the happening of some event preventing completion of the reclamation which could not have been reasonably anticipated or guarded against, such as:

1. Destruction of dams, reservoirs, canals, ditches, or other works constructed, or partly constructed, by storms, floods, or other unavoidable casualties.

2. Inability to complete construction of reservoirs, ditches, canals, etc., within the ten years because of unforeseen structural or physical difficulties encountered, in cases where construction was promptly begun and diligently prosecuted.

3. Error or misjudgment in surveying and locating ditches, canals, etc., necessitating new surveys and construction in order to effect proper and permanent reclamation.

4. Financial failures on the part of the contractor under the State, which delayed or prevented reclamation and which could not have been foreseen or reasonably anticipated.

5. Other reasons not above specified but falling within the general scope of these instructions will be considered if presented; but in all cases the showing made must be by or through the proper State authorities and clearly and specifically set forth all the facts and reasons which prevented the completion of the contract or reclamation of the land within the ten year period.

JOHN D. INGRAM.

Motion for review of departmental decision of May 13, 1909, 37 L. D., 475, denied by First Assistant Secretary Pierce May 13, 1909.

HOMESTEAD—COMMUTATION—PURPOSE OF HOMESTEAD LAW.

GILBERT SATRANG.

A homestead entry made with no intention of establishing a permanent *bona fide* home upon the land, but merely with a view to submitting a showing sufficient to support commutation, must be canceled, notwithstanding the proof offered shows full technical compliance with respect to inhabitancy of the land for the period ordinarily required in commutation cases.

The purpose of the homestead law is the donation of the public lands to actual settlers seeking to establish *bona fide* homes thereon, and the provision respecting commutation in no wise changes that purpose but merely affords a means of commuting further residence to cash in meritorious cases lawfully initiated and prosecuted to the date of commutation.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 13, 1909. (F. W. C.) (E. F. B.)

Gilbert Satrang has appealed to the Department from your decision of September 18, 1908, reversing the action of the local officers of May 2, 1908, and holding for cancellation his homestead entry No. 475, made November 21, 1904, for the SE. $\frac{1}{4}$, Sec. 6, T. 123 N., R. 93 W., Dickinson, North Dakota, land district. January 23, 1906, commutation proof was submitted upon this entry, but pending investigation no certificate was issued.

July 21, 1906, a special agent filed charges against said entry, that the claim was abandoned; no enclosure; that the improvements consist of a small frame shack 10 by 12 feet and about three acres of breaking that has never been cropped, value about \$50; that claimant's residence had been in Canton, South Dakota, where he had a home and was engaged in business as a merchant and had lived with his family, except a few months in the summer of 1905, and where he returned to make proof in January, 1906.

Upon due proceedings therefor, hearing occurred before the local officers in April, 1908, the Government being represented by a special agent, and the entryman appearing in person with counsel and witnesses. Prior to the date set for hearing, depositions were taken on behalf of the Government.

The local officers found that the United States had failed to sustain the charge, and that claimant established residence on the land in May, 1905, and continued to reside thereon almost continuously up to the submission of final proof. They recommended that the proceedings be dismissed.

You found that the entry was not made in good faith; that claimant made his entry with the intention of occupying the land only for such short period as would permit him, following the strict letter of the law, to pay the government the purchase price by commutation of his entry and then to abandon the land as a home.

The material facts in the case may be briefly stated. The entry was made November 21, 1904. Prior to that time claimant was engaged in mercantile business at Canton, South Dakota, in the store that he owned, and still owned at the date of the hearing. He sold out his business in 1902, but up to the time he went upon his claim he had been clerking for different business firms in Canton and was living in a house that he had purchased and deeded to his wife, in which he and his family had resided for several years, and which he continued to occupy up to the time of making settlement upon the land. Claimant went upon the land between the 15th and 20th of May, 1905, just about the expiration of the six months period from date of entry, so as to bring him within the rule allowing six months in which to establish actual residence on the claim.

In June thereafter the house in Canton was rented furnished for an indefinite period to J. B. Slosson, the person who located claimant. As to the renting of the house the claimant testified:

The understanding was that he should keep the house until my wife called for it again; that is, it was not rented for any definite time—no definite length of time.

In answer to the question propounded to claimant whether there was an understanding that he would return and occupy the house after he commuted, he answered:

I don't think there was any understanding or any talk about it. They should occupy the house until her return. If we commuted, of course, the understanding was that she should have it back.

Claimant's wife went upon the land after the renting of the house and remained with claimant until the latter part of October or the first of November, when she returned to Canton.

Claimant states that he remained on the land until a few days before Christmas of that year when he returned to Canton "to get money to prove up with." He testified that he returned to his claim the first part of January, 1906, and submitted final proof January 23, when he immediately returned to Canton, where he has resided with his family ever since. He was appointed watchman at the Indian Asylum January 29, 1906, which position he still held at the date of hearing, April 17, 1908, and had not returned to the land since he made proof.

It is also shown by the testimony that claimant continued to rent a box in the post office at Canton from 1904 to the date of hearing; that the mail for himself and family was received at that office and forwarded to Mott, the post office nearest his claim from some time in the spring of 1905 to September or October of that year.

It is also shown that at the time he made his entry it was explained to him that he could commute his entry in fourteen months from

the time he made it. Bearing upon the question of his intention to return to Canton and live in his house after he had commuted his homestead, he said:

There was not really any intentions made; that is, I wanted to get a position of some kind. If I did not get it in Canton I would strike it some other place. I had not made up my mind to any certain thing; strike a position whenever I could do the best.

Q. You did not dispose of any of your furniture or personal effects in the house in Canton?—A. No, sir.

Q. You intended to return to that place?—A. If I could get work I intended to stay there.

It is shown by the testimony of claimant, which is not contradicted in any material respect, that he occupied the land from about the 15th or 20th of May, 1905, to some time in January, 1906, just prior to making final proof (January 23)—about eight months, except temporary absences of a week or two on one or two occasions and at other times of a day or two, while away on business or visiting friends. During that time his wife was with him about four or five months.

It will be seen from that testimony that claimant went upon the land immediately before the expiration of six months from the date of entry, and continued to occupy it for eight months thereafter, his wife being with him a little more than half of that time. He submitted commutation proof within two days after the expiration of fourteen months from the date of entry.

If mere occupancy of a homestead claim for a period of eight months, commenced before the expiration of six months from date of entry will entitle the claimant to purchase the land, this claimant has complied with the law and is entitled to a patent. But if title to land under the homestead law can only be acquired by establishing and maintaining an actual *bona fide* residence and by improving and cultivating the land with the honest purpose of making the land a home, this entry must be canceled for the reason that it is impossible to avoid the conclusion that every act of claimant, from the inception of entry until the making of final proof, was made with a studied purpose to perform such acts only as he considered essential to a show of compliance with the mere letter of the law and regulations, with a view solely of acquiring title to the land by purchase, and that he never at any time had an honest intention of making the land a home.

The aim and object of the homestead law is the donation of the public lands to settlers seeking to establish agricultural homes thereon, upon the condition that actual residence be established thereon and that the land be cultivated and improved. It was designed to have the public lands settled upon and improved by homeseekers rather than to have them disposed of for the purpose of revenue.

Residence within the meaning of the homestead law must be established and maintained with the intent to make a permanent home upon the land to the exclusion of a home elsewhere. It can not be acquired by mere occupancy with a view solely to acquiring title by a colorable compliance with the law, but actual residence must be maintained in good faith with the intent to make it permanent. *Mary Campbell* (8 L. D., 331); *Dayton v. Dayton* (Ib., 248); *Desmond v. Judd* (22 L. D., 619); *George W. Harpst* (36 L. D., 166). Such intent must be present at the initiation of every entry, whether the title is acquired after the full period of residence prescribed by law, or at the expiration of the shorter period under the commutation provisions of the act. There is but one character of residence applicable to every homestead entry, and that means a residence having the character of permanency, and established and maintained with such intent.

To construe the commutation provisions of the homestead law as meaning that a person having the proper qualifications may make entry with a view to the purchase of the land after a short period of occupancy, but with no intention of occupying the land after the submission of final proof or after he shall have acquired the title as a home, would defeat the very purpose of Congress as expressed in the act of March 2, 1889, withdrawing from private entry all public lands except in the State of Missouri, and as declared in the act of March 3, 1891, that no public lands, except abandoned military and other reservations, isolated and disconnected tracts and mineral and other lands, the sale of which has been authorized by law, shall be sold at public sale.

The intent of the commutation provision is indubitably derivable from the act itself. An onerous task was imposed of five years' residence and cultivation as a condition to the granting of title. In the mutability of human affairs it was evident that some who accepted the proposal in utmost good faith, with intent to comply strictly, would be unable to do so, and others could not without unreasonable inconvenience and loss. Without some such provision, they would be compelled to lose all expenditure for improvement and all time served on the entry period, as well as the loss of the homestead right.

The commutation provision was the relief offered against such unforeseen casualties and accidents. There might be an infinite variety of them, failing health, disabling injuries, offers of better employment, and the infinite variety of things that within five years change the desires and aims of many lives.

It was to meet this accident of life that the commutation provision was framed to relieve. It follows that there must have been an original *bona fide* intent to make the land a home.

Throwing the light of the preemption law on the homestead act confirms this construction. The commutation provision of the homestead law had stood for thirty-one years as a standing offer to sell land conditioned on "making proof of settlement and cultivation as provided by law granting preemption rights." When the policy for sale of the public lands was definitely abandoned by the acts of March 2, 1889, and March 3, 1891, the provision was amended to conform to such policy, and commutation of the entry was allowed only after the extension of fourteen months from date thereof, upon "making proof of settlement and of *residence* and cultivation for such period of fourteen months." Such change in the act emphasized the intent and object of such provision and clearly indicated, by the extension of the time, that its purpose was to prevent the evasion of the policy not to sell the public lands, by requiring the entry to be made in good faith with a view to the establishment and maintenance of a permanent home.

"The element of good faith is the essential foundation of all valid claims under the homestead law." *Lee v. Johnson*, 116 U. S., 48, 52. Applying that test to this case, claimant never at any time established a residence upon the land within the meaning and intent of the homestead law, and his occupancy of the land, though continuous for a period of eight months, was not maintained with a view to making a permanent home upon the land, but solely for the purpose of acquiring title thereto. Such intent and purpose, which is clearly shown by his acts at the time of the initiation of his claim, is strongly corroborated by his conduct subsequent to the making of final proof, which will always be considered in connection with other testimony as illustrating the intent and purpose in making the entry.

Your decision is affirmed.

REPAYMENT—DOUBLE MINIMUM LAND—ACT OF JUNE 15, 1880.

THOMAS EMANUELSON.

Double minimum lands within the limits of the grant to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, reduced in price by the act of June 15, 1880, were again raised to double minimum upon subsequently falling within the limits of the grant to the Northern Pacific Railway Company as fixed by definite location July 6, 1882, and after that date were properly rated at \$2.50 per acre.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 13, 1909.* (C. J. G.)

An appeal has been filed by Thomas Emanuelson from your office decision of September 8, 1908, denying his application for repayment under the act of March 26, 1908 (35 Stat., 48), of excess of \$1.25 an acre, alleged to have been paid by him upon cash entry for the

SE. 4, Sec. 32, T. 47 N., R. 5 W., Bayfield, Wisconsin. Section 3 of said act provides:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

The entry of Emanuelson was made May 28, 1885, at which time he paid the sum of \$400 for the land, being at the rate of \$2.50 per acre.

The land is within the limits of the grant made by the act of June 3, 1856 (11 Stat., 20), to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company. Said act provides that the reserved alternate sections shall not be sold for less than double the minimum price of the public lands and shall not become subject to private entry until the same has been first offered at public sale at the increased price. The map of definite location of said railroad was filed June 17, 1858, and the land involved herein, with other lands, was offered at the increased price of \$2.50 per acre prior to January, 1861.

The land involved also fell within the limits of the grant made by the act of July 2, 1864 (13 Stat., 365), to the Northern Pacific Railroad Company, which grant was of lands to which—

the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of road is definitely fixed, and a plat thereof filed in the Office of the Commissioner of the General Land Office.

The map of general route of said road was filed August 3, 1870, and the map of definite location, July 6, 1882. Section 6 of said act provided:

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1861, shall be and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than \$2.50 per acre, when offered for sale

It was provided by section 3 of the act of June 15, 1880 (21 Stat., 237):

That the price of lands now subject to entry which were raised to \$2.50 per acre, and put in market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes is hereby reduced to \$1.25 per acre.

In the case of John Baxter (11 L. D., 99), involving application for repayment of alleged excess paid on an entry made August 14, 1889, for land within the overlapping limits of grants to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company and to the Northern Pacific Railroad Company, it was held that "land within the limits of a railroad grant and reduced in price by the act of June 15, 1880, is again raised to double minimum if subsequently falling within the limits of another grant."

That would seem to be conclusive of this case, but it is contended herein that the filing of map of general route by the Northern Pacific Railroad Company in 1870 and not the filing of map of definite location in 1882, is what fixed the price of the land embraced in Emanuelson's entry so far as the Northern Pacific grant was concerned and that said price having been reduced by the act of 1880, it could not again be raised except by later legislation.

At the time of the Northern Pacific grant, this land was already included within the limits of the grant to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, as shown by map of definite location filed June 17, 1858, and had been increased in price on account thereof; consequently the grant to the Northern Pacific Railroad Company had no immediate effect, so far as increasing the price.

Further, the Northern Pacific grant never became definitely located or fixed prior to the passage of the act of 1880, so that the lands were in 1880 merely affected by the Omaha grant and were clearly reduced in price by said act.

It is true that prior to this time a map of general route of the Northern Pacific road had been filed and the lands here in question were within the reserved limits upon such route, but the courts have repeatedly held that by the filing of such general route no rights vested or even attached under the grant, so that it could not be said in 1880 that these lands were within the primary limits of the Northern Pacific grant.

It is not intended to question the authority to hold at \$2.50 per acre these lands falling within the reservation on account of general route prior to definite location of the road, but merely to show that prior to 1880 there had been no such action on the part of the grantee claimant as fixed, in this vicinity, rights under the Northern Pacific grant.

The only question remaining, therefore, is as to whether by reason of the definite location under the Northern Pacific grant, occurring as it did after the act of 1880, these lands were again increased in price. Had the Northern Pacific grant been made subsequently to the act of 1880, no question could possibly have been raised, and, as no rights attach under the grant until definite location, it seems under the facts of the case that the considerations are the same.

Primarily the alternate sections within a railroad grant were increased in price because of the benefit to be derived from close proximity to a railroad, and to partly recompense the Government for the sections granted. After land had been increased and put into market for a long time and not disposed of, Congress thought it wise to reduce the price, but did not repeal existing laws under which they might be further benefited by the building of other roads for which grants had been made and by the terms of which grants alternate sections were to be increased in price.

In respect to the interest acquired by the Northern Pacific Railroad Company in lands by virtue of the act of 1864 and the filing of map of general route, the Supreme Court of the United States has, on numerous occasions, held that the definite location of the road is what determines the company's vested right to the lands covered by its grant.

See cases of *Van Wyck v. Knevals*, 106 U. S., 360; *Buttz v. Northern Pacific Railroad Company*, 119 U. S., 55, 71, 72; *United States v. Northern Pacific Railroad Company*, 152 U. S., 284, 296; *Northern Pacific Railroad Company v. Sanders*, 166 U. S., 620, 629, 634; *United States v. Oregon, &c. Railroad Company*, 176 U. S., 28, 42, 43; *Nelson v. Northern Pacific Railway Company*, 188 U. S., 108, 121.

See also cases of *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S., 1; *Menotti v. Dillon*, 167 U. S., 703; *Hewitt v. Schultz*, 180 U. S., 139; *Southern Pacific Railroad Company v. Bell*, 183 U. S., 675; *U. S. v. Northern Pacific Railroad Company*, 193 U. S., 1; *Sjoli v. Dreschel*, 199 U. S., 564; and *Northern Pacific Railroad Company v. Plumb*, 16 L. D., 80; *Northern Pacific Railroad Company v. Benz*, 19 L. D., 229.

It was upon the principle advanced in the foregoing cases that decision in the *Baxter* case was rendered. In that case, the Northern Pacific grant and filing of map of general route were treated as having no effect on the price of the land there involved which had been raised to \$2.50 per acre on account of the Omaha grant and put in market prior to 1861. When, therefore, it was held in said decision that the price was reduced by the act of 1880, reference was had to the increase in price by reason of the grant prior to 1861 and not to any effect of the Northern Pacific grant. Under that decision there was no increase in price under the Northern Pacific grant—by analogy to the Supreme Court rulings—until the filing of the map of definite location of the road.

It was not held in the *Baxter* case, as urged in this appeal, that the act of 1880 was controlled by the act of 1864. On the contrary, it was held that the act of 1880 reduced the price of the land involved to \$1.25 per acre, the same having been raised in price and put in market prior to 1861, but that by filing its map of definite location

by the Northern Pacific Railroad Company, July 6, 1882, the price of said land was again raised to double minimum.

In the cases of William Edmonston (20 L. D., 216), Inez Rhodes (27 L. D., 147), and Albert Nelson (28 L. D., 248), referred to in the appeal, involving lands raised in price and offered prior to 1861, it was found that \$2.50 an acre was erroneously charged for said lands, although there was no authority for refunding the excess, but in none of said cases was the fact taken into consideration that the lands subsequently fell within the Northern Pacific grant and hence they can not be regarded as overruling or modifying the Baxter case. The Edmonston case was appealed to the Supreme Court from the judgment of the Court of Claims in his favor, among the findings of which court was one to the effect that the land there involved "was never alternate reserved land to the United States along the line of railroads within the limits granted by any other act of Congress to any other railway company" than the Chicago, St. Paul, Minneapolis & Omaha Railroad Company. Regardless of the fact, therefore, that the Supreme Court limited its decision to the question of voluntary payment, there could have been no question of raise in price subsequent to the act of 1880 by reason of another grant, as in the Baxter case. There being no other grant covering the land involved in the Edmonston case, the Supreme Court properly held that by the act of 1880 the price of his land was reduced to \$1.25 per acre, and that, therefore, he paid more than the law required.

Reference is also made in the appeal to the case of Daniel Van Iderstine, in which judgment was rendered in the Court of Claims against the United States and in his favor for \$200, being the amount he was overcharged for land which it is alleged was similarly situated to that of Emanuelson herein. The appeal was taken from that judgment to the Supreme Court, where the same was affirmed by a divided court. The only question raised on such appeal was the one of voluntary payment, there being no finding that the land was within the Northern Pacific grant. It appears that the only report of the Van Iderstine case in the Supreme Court is a memorandum of affirmation by a divided court, nor is it reported in the Court of Claims, as no report of that court was filed in the case. Under the circumstances, the judgment in that case cannot be regarded as aiding or controlling the disposition of the case at bar, especially as the only question raised on appeal to the Supreme Court was the one of voluntary payment.

The judgment of the Department, therefore, is that this is not a case where the party paid in excess of the amount required by law within the meaning of the act of March 26, 1908.

The decision of your office denying repayment is accordingly affirmed.

REPAYMENT—DOUBLE MINIMUM LAND—ACT OF JUNE 15, 1880.

GEORGE HYLAND ET AL.

Double minimum lands within the limits of the grant to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company were reduced by the act of June 15, 1880, to \$1.25 per acre, and so remained until subsequently again raised to double minimum upon falling within the limits of the grant to the Northern Pacific Railway Company as fixed by definite location July 6, 1882; and entrymen who during that period were erroneously charged double minimum for any of such lands are entitled to repayment of the excess.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 13, 1909.* (C. J. G.)

Your office submitted, under the act of March 26, 1908 (35 Stat., 48), an account allowing the claims of the legal representatives of George Hyland and John Hyland, deceased, for repayment of excess purchase money paid by them on cash entries made, respectively, September 12 and October 27, 1881, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 6; and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$, Sec. 32, T. 48 N., R. 6 W., Bayfield, Wisconsin. Said act provides that:

In all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

The lands involved are within the limits of the grant made to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company by the act of June 3, 1856 (11 Stat., 20), as shown by map of definite location filed June 17, 1858. Under said grant the lands were raised to double minimum price, or two dollars and fifty cents per acre, and were offered at that price prior to January, 1861.

The lands also fell within the limits of the grant made to the Northern Pacific Railroad Company by the act of July 2, 1864 (13 Stat., 365), as shown by map of definite location filed July 6, 1882.

By section 3 of the act of June 15, 1880 (21 Stat., 237), it was provided:

That the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, eighteen hundred and sixty-one, by reason of the grant of alternate sections for railroad purposes, is hereby reduced to one dollar and twenty-five cents per acre.

In the case of John Baxter (11 L. D., 99), involving application for repayment of excess of one dollar and twenty-five cents per acre paid on cash entry made on August 14, 1889, for lands within the

limits of the same two railroad grants as in the present case, it was held:

Land within the limits of a railroad grant, and reduced in price by the act of June 15, 1880, is again raised to double minimum if subsequently falling within the limits of another grant.

Under the terms of that decision the entries in question having been made for the lands after reduction of their price by the act of 1880 and prior to the filing and acceptance of the map of definite location of the Northern Pacific grant, the proper price to be charged for said lands was one dollar and twenty-five cents per acre. Hence, cases are presented where payments were made in excess of the amount the entrymen were lawfully required to pay under the public land laws within the meaning of the act of March 26, 1908. The account, as made up in these cases, is accordingly approved, and is herewith returned to your office, together with the other papers submitted.

RESIDENCE—MILITARY SERVICE—PHILIPPINE INSURRECTION—ACT OF MARCH 1, 1901.

CARL MCGREGOR.

One who enlisted and served ninety days during the Philippine insurrection and after the suppression thereof made a homestead entry is entitled under the act of March 1, 1901, to credit, in lieu of residence, to the period of his service prior to the date the insurrection came to an end, but is not entitled to credit for such part of his enlistment as extended beyond the close of the insurrection.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 15, 1909.* (G. C. R.)

Carl McGregor has appealed from your office decision of January 19, 1909, which rejected his final proof taken August 8, 1908, in support of his homestead entry, Glasgow Serial No. 0548 (Great Falls H. E. 3575), made August 9, 1906, for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, N. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 28, T. 30 N., R. 29 E., Glasgow, Montana.

The proof was rejected because the same did not show five years' residence upon the land, claimant contending that his period of service in the United States Navy should be deducted from the five years ordinarily required of homestead entrymen.

Claimant by virtue of his services in the United States Navy from November 20, 1903, to honorable discharge, April 11, 1906, is entitled to credit for residence on the land under the act of March 1, 1901 (31 Stat., 847), amending sections 2304-5, R. S., having served in the navy for ninety days "during the suppression of the insurrection in

the Philippines." The insurrection, however, was declared at an end July 15, 1903, when civil government was established over the Moro tribes—the last tribes, apparently, to yield to civil authority. See James M. Esterling (36 L. D., 294).

While claimant enlisted "during the suppression" of the Philippine insurrection, it is not shown that he was ever in or near the Philippine Islands or that he directly aided in the suppression.

His entry was not made until August 9, 1906, long after the suppression of the insurrection. He obviously can not and does not, as Esterling did in case cited, ask credit for residence on land duly entered before enlistment.

His final proof shows about two years' residence on the land. It is contended that full three years should be credited to him and that period deducted from the five years generally required of entrymen in making satisfactory final proof and that the entry should be passed to patent on the proof offered.

It is a sufficient answer to say that but a small part of his naval service (your office states five months, five days), was performed "during" the suppression of the Philippine insurrection, and that period only can be legally deducted from the full period of five years' residence required by law to earn patent. James M. Esterling, *supra*.

The action appealed from is affirmed.

WAGON ROAD GRANT—LANDS GRANTED—ACT OF FEBRUARY 25, 1867.

THE DALLES MILITARY WAGON ROAD COMPANY.

The grant to the State of Oregon by the act of February 25, 1867, to aid in the construction of a military wagon road, was operative only upon lands within the boundaries of that State; and lands outside the State, although within six miles of the road, do not constitute a valid basis for indemnity.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 15, 1909.* (S. W. W.)

This case involves the construction of the act of Congress approved February 25, 1867 (14 Stat., 409), making a grant of lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River, and is brought before the Department by the appeal of the Dalles Military Wagon Road Company, grantee of the State, from your office decision of October 24, 1908, holding for cancellation a list of indemnity selections aggregating 3,225.28 acres in the Burns, Oregon, land district.

It appears from your said decision that the list in nowise complies with the requirements laid down by the Department in the case of *La Bar v. Northern Pacific Railroad Co.* (17 L. D., 406), as to the arrangement of lists and the designation of losses, tract for tract by legal subdivisions against the selected lands, and for that reason alone the list might be canceled; but, inasmuch as other reasons are presented which in the opinion of your office justify the cancellation of the list, your decision proceeds to consider the same for the purpose of avoiding the necessity for future consideration, should the case be again presented through any rearrangement of the selections and the bases.

The company designated as basis in this list 197.09 acres of land in the Columbia river and 2560 acres of land in the State of Washington; and your decision holds that lands falling in the Columbia river and land within the granted limits of the road, but situated within the State of Washington, do not constitute valid basis to support indemnity selections under the terms of the grant involved. The appeal admits that land lying under the waters of the Columbia river does not constitute valid basis for indemnity selection, and the only question discussed by appellant is the right of the company to select indemnity for the odd sections situated in the State of Washington and within six miles of the road as located.

The appellant cites in support of its contention the decision of the Supreme Court of the United States in the case of the *St. Paul, Minneapolis and Manitoba Railroad Co. v. Phelps* (137 U. S., 528), which case is also relied upon by your office as authority for holding that the grant to the State of Oregon to aid in the construction of a military road included only lands within the limits of the State and that the lands lying within the State of Washington did not pass, notwithstanding the fact that such lands might be within the primary or six-mile limit of the grant.

The act under consideration provides in the first section thereof—

That there be and hereby is granted to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia river, by way of Camp Watson, Canon City, and Mormon or Humboldt Basin, to a point on Snake river opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road.

Dalles City, or what is now known as The Dalles, is situated in the northern part of the State on the Columbia river, the boundary line between Oregon and Washington, while Fort Boise, at the date of the act making the grant was situated in the Territory of Idaho on the east bank of Snake river, the boundary between Oregon and Idaho. It thus appears that the road, in aid of which the grant was made, was to be constructed entirely within the borders of the State of Oregon.

It appears from a map of the State of Oregon made by the Surveyor-General on September 14, 1871, that Camp Watson, the first point named in the act making the grant on the route of said road, is situated in what now is approximately township 11 or 12 S., R. 22 east, and is thus southeast of Dalles City and somewhat in the same general direction from that place as is old Fort Boise, mentioned in the act as being opposite the other terminus of the road. If, therefore, the road had been constructed in approximately a direct line, little or no land in the State of Washington would have fallen within six miles of the road; but the road seems to have been constructed in an easterly direction from Dalles for a distance of ten or twelve miles before it turns south or southeast in the direction of Camp Watson. Thus it follows that as The Dalles is on the north boundary of Oregon and the road was constructed for a distance of ten or more miles in an easterly direction, land within six miles of the road and north of the same would necessarily fall without the boundaries of the State of Oregon and within the boundaries of Washington.

The general policy of the Government as established, not merely by construction of the Interior and law departments of the Government but also by the plain language of the statutes and the decisions of the courts, has been to confine land grants made in aid of railroads wholly within a State or Territory to lands lying within the same State or Territory. See *St. Paul, Minneapolis and Manitoba Railroad Co. v. Phelps*, *supra*. It is true, in that case the court held that a grant made to the Territory took effect by relation upon the sections of land as of the date of the grant when the railroads were definitely located both as to so much of the grants as was found within the limits of the State of Minnesota, and as to so much thereof as was within the limits of the Territory of Minnesota under the territorial organization but was not within the limits of the State when admitted as a State. And there is nothing whatever in said decision from which it may be inferred that the court was of the opinion that where a grant is made to a State to aid in the construction of a road, which road is to be located entirely within the boundaries of such State, such grant would operate upon any lands not within the jurisdiction of the State named.

In the case cited the court said:

In most if not all of the grants of land made to the various States in aid of railroads within their respective limits, some words of limitation were used to denote that the grant was restricted to lands within each particular State, when such restriction was intended.

Following this declaration the court cited numerous grants, similar in many respects to the one now under consideration, and concluded therefrom that in a grant made to a State for the construction of rail-

roads where the granting act specified as termini of the road points entirely within the State, such specification was a limitation intended to restrict the grant to the State named in the act.

From what has been stated it will be seen that The Dalles military road was to be constructed entirely within the limits of the State of Oregon extending from Dalles City to a point on Snake River opposite Fort Boise, and that if it had been constructed approximately in a straight line and in accordance with the terms of the grant all of the land within six miles thereof would have been within the limits of the State. This constitutes one reason for concluding that Congress intended to grant only lands within the State of Oregon; moreover, the provision of the sixth section of the granting act has an important bearing on this question and, indeed, is believed to be controlling. That section provided that the United States Surveyor-General for the District of Oregon should cause the lands granted to be surveyed at the earliest practicable period after the State had enacted necessary legislation to carry the act into effect. Inasmuch as the Territory of Washington had been made a separate surveying district by the previous act of July 17, 1854 (10 Stat., 305), the provision of section 6 of the act making the grant to aid in the construction of this road clearly indicates that it was the intention of Congress to grant only lands within the limits of the State of Oregon.

For these reasons your office decision is affirmed.

ARTHUR H. MILLER.

Motion for review of departmental decision of March 18, 1909, 37 L. D., 506, denied by First Assistant Secretary Pierce, May 20, 1909.

**ENLARGED HOMESTEAD—ADDITIONAL ENTRIES—SECTION 3, ACT OF
FEBRUARY 19, 1909.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 21, 1909.

REGISTERS and RECEIVERS,

*United States Land Offices, Colorado, Montana, Nevada, Oregon,
Utah, Washington, Wyoming, Arizona, and New Mexico.*

GENTLEMEN: Paragraph 5 of the instructions of March 25, 1909 (37 L. D., 546), under the enlarged homestead act of February 19, 1909 (35 Stat., 639), is hereby amended to read as follows:

ADDITIONAL ENTRIES.

5. Section 3 of the act provides that any homestead entryman of lands of the character described in the first section of the act, upon which entry final proof

has not been made, may enter such other lands, subject to the provisions of this act, contiguous to the former entry, which shall not, together with the lands embraced in the original entry, exceed 320 acres, and that residence upon and cultivation of the original entry shall be accepted as equivalent to residence upon and cultivation of the additional entry.

This section contemplates that lands theretofore entered may be classified or designated by the Secretary of the Interior as falling within the provisions of this act and in such cases an entryman of such lands who had not at the time of the classification or designation of the lands made final proof may make such additional entry provided he is otherwise qualified. Applicants for such additional entries must, of course, tender the proper fees and commissions and must make application and affidavit on the Form No. 4-004, attached hereto. Entry-men who made final proof on the original entries prior to the date of the act or prior to the classification or designation of the lands as coming within the provisions of the act are not entitled to make additional entries under this act.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

OPENING FLATHEAD, COEUR D'ALENE AND SPOKANE LANDS.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the acts of Congress hereinafter named, do hereby prescribe, proclaim and make known that all the nonmineral, unreserved lands classified as agricultural lands of the first class, agricultural lands of the second class and grazing lands within the Flathead Indian Reservation in the State of Montana under the act of Congress approved April 23, 1904 (33 Stat., 302), which have not been withdrawn under the act of Congress approved June 17, 1902 (32 Stat., 388); all the nonmineral, unreserved lands classified as agricultural lands within the Spokane Indian Reservation in the State of Washington under the act of Congress approved May 29, 1908 (35 Stat., 458); and all the nonmineral, unreserved lands classified as agricultural lands, grazing lands and timbered lands in the Coeur d'Alene Indian Reservation in the State of Idaho under the act of Congress approved June 21, 1906 (34 Stat., 335), shall be disposed of under the provisions of the homestead laws of the United States and said acts of Congress and be opened to settlement and entry in the following manner and not otherwise:

1. All persons qualified to make a homestead entry may, on and after the fifteenth day of July and prior to and including the fifth day of August, 1909, but not theretofore or thereafter, present to

James W. Witten, Superintendent of the 'Opening, at the City of Coeur d'Alene in the State of Idaho, by ordinary mail, but not in person or by registered mail or otherwise, sealed envelopes containing their applications for registration for lands in any or all of said reservations, but no envelope should contain more than one application and no person should present more than one application for lands in the same reservation.

2. All applications for registration must be on forms furnished by the General Land Office, and they must show the name, postoffice address, age, height and weight of the applicant, and be sworn to by him on or after July 15, and prior to and including August 5, 1909, before some notary public designated by said Superintendent.

3. Applications for registration must be sworn to at the following places and not elsewhere. Applications for Flathead lands must be sworn to at either Kalispell or Missoula, Montana, for Spokane lands at Spokane, Washington, and for Coeur d'Alene lands at Coeur d'Alene, Idaho.

4. Persons who were honorably discharged after ninety days' service in the Army or Navy of the United States, during the War of the Rebellion, the Spanish-American War, or the Philippine Insurrection, or their widows or minor orphan children, may present their applications for registration, either in person or through their duly appointed agents, but no person can act as agent for more than one such applicant and all applications presented by agents must be signed, sworn to and presented by them at the same places and in the same manner in which other applicants are required to present their applications.

5. Beginning at ten o'clock a. m. on August 9, 1909, at the City of Coeur d'Alene in the State of Idaho and continuing thereafter from day to day, Sundays excepted, as long as may be necessary, there shall be impartially taken and selected indiscriminately from the whole number of envelopes so presented such number thereof as may be necessary to carry into effect the provisions of this Proclamation, and the applications for registration contained in the envelopes so selected shall, when correct in form and execution, be numbered serially in the order in which they are selected, beginning with number one for the lands within each of said Reservations, and the numbers thus assigned shall fix and control the order in which the persons named therein may make entry after the lands shall become subject to entry.

6. A list of the successful applicants, showing the number assigned to each of them, will be conspicuously posted and furnished to the press for publication as a matter of news, and a proper notice will be promptly mailed to each person to whom a number is assigned.

7. Beginning at nine o'clock a. m. on April 1, 1910, and continuing thereafter on such dates as may be fixed by the Secretary of the In-

terior, persons holding numbers assigned to them under this Proclamation will be permitted to present their applications to enter (or file their declaratory statements in cases where they are entitled to file declaratory statements) at the land office for any land district in which their numbers entitle them to make entry, in the order in which their applications for registration were selected and numbered, but no person can present more than one application to enter or file more than one declaratory statement.

8. If any person fails to apply to enter (or to file a declaratory statement if he is entitled to do so), on the day assigned him for that purpose, or if he presents more than one application for registration for lands within the same reservation, or presents an application in any other than his true name, he will forfeit his right to make entry or filing under this Proclamation.

9. None of the lands opened to entry under this Proclamation shall become subject to settlement or entry prior to the first day of September, 1910, except in the manner prescribed herein; and all persons are admonished not to make any settlement prior to that date on lands not covered by entries or filings made by them under this Proclamation. On September 1, 1910, all of said lands which have not then been entered under this Proclamation will become subject to settlement and entry under the general provisions of the homestead laws and the said acts of Congress.

10. The Secretary of the Interior shall make and prescribe such rules and regulations as may be necessary and proper to carry this Proclamation and the said acts of Congress into full force and effect.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-second day of May, in the year of our Lord one thousand nine hundred and nine, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.]

WM. H. TAFT.

By the President:

P. C. KNOX,

Secretary of State.

OPENING FLATHEAD, COEUR D'ALENE AND SPOKANE LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 24, 1909.

JAMES W. WITTEN,

Superintendent of Opening and Sale of Indian Lands.

SIR: Pursuant to the Proclamation of the President issued May 22, 1909, for the opening to settlement and entry of certain lands within

the Flathead Indian Reservation in the State of Montana, the Coeur d'Alene Indian Reservation in the State of Idaho and the Spokane Indian Reservation in the State of Washington, under the acts of Congress named therein, the following rules and regulations are hereby prescribed:

1. *Applications for registration.*—Any person qualified to make a homestead entry may present application for registration for lands in any or all of said reservations, but his application must be sworn to at Coeur d'Alene, Idaho, if he registers for Coeur d'Alene lands; at either Kalispell or Missoula, Montana, if he registers for Flathead lands; and at Spokane, Washington, if he registers for Spokane lands.

2. Applications for registration and powers of attorney for the appointment of agents by soldiers or sailors, or their widows or minor orphan children, should be substantially, in words and form, like those hereto attached.

3. All envelopes in which applications for registration are to be mailed should be three and one-half inches wide and six inches long, and they must be plainly addressed to "James W. Witten, Superintendent, Coeur d'Alene, Idaho," and the name of the reservation embracing the lands which the applicant desires to enter must be plainly written or printed across the front and at the left end of the envelope. All envelopes should be securely sealed and have the requisite postage stamps attached thereto, before they are placed in the mail.

4. No envelope should contain more than one application for registration or contain any other paper than the application and agent's authority. Proof of naturalization and of military service, and other proof required (as in case of second homestead entries) will be exacted before the entry is allowed, but should not accompany the application for registration.

5. Blank forms of application for registration and addressed envelopes to be used in forwarding applications to the Superintendent will be furnished to each applicant by the Superintendent, through the notaries public before whom the applicants are sworn. Blank powers of attorney to be used by soldiers or sailors, or their widows or minor orphan children, in the appointment of agents, may be obtained from the Superintendent at Washington, D. C., prior to July 5, 1909, and after that date from him at Coeur d'Alene, Idaho.

6. *Method of receiving and handling applications.*—As soon as the Superintendent of the Opening receives an envelope addressed to him, with the name of any of the reservations endorsed thereon, he will (if such envelope bears no distinctive marks or words indicating the name of the person by whom it was presented) deposit it in a metal can set apart for the reception of all envelopes bearing a like endorsement. The cans used for this purpose must be so constructed

as to prevent envelopes deposited therein from being removed therefrom, without detection, and they must be safely guarded by representatives of the Government, until they are publicly opened on the day when the selections authorized by the Proclamation are to be made. All envelopes which show the name of the person by whom they were mailed will be at once opened and the applications therein will be returned to the applicants.

7. *Method of assigning numbers to applicants.*—On August 9, 1909, the cans containing the applications for registration presented by persons who desire to enter Coeur d'Alene lands will be publicly opened and all envelopes contained therein will be thoroughly mixed and distributed preparatory to the selection and numbering thereof in the manner directed by said Proclamation.

8. After selections of envelopes and assignments of numbers have been made from the applications presented by persons desiring to enter lands within the Coeur d'Alene Indian Reservation, the cans containing applications for registration presented by persons who desire to enter lands within the Flathead Indian Reservation will be opened, and all envelopes contained therein will be thoroughly mixed and distributed, preparatory to the selection and numbering thereof in the manner directed by said Proclamation.

9. After selections of envelopes and assignments of numbers have been made from the applications deposited by persons desiring to enter lands within the Flathead Indian Reservation, the cans containing applications for registration presented by persons who desire to enter lands within the Spokane Indian Reservation will be opened, and all envelopes contained therein will be thoroughly mixed and distributed, preparatory to the selection and numbering thereof in the manner directed by said Proclamation.

10. Numbers will not be assigned to a greater number of persons than will be reasonably necessary to induce the entry of all the lands subject to entry in each of said reservations under said Proclamation. The applications for registration presented by persons to whom numbers are not assigned will be carefully arranged and inspected, and if it is found that any person has presented more than one application for lands in the same reservation, or presented his application in any other than his true name, or in any other manner than that directed by said Proclamation, he will be denied the right to make entry under any number assigned to him.

11. When an application for registration has been selected and numbered, as prescribed by said Proclamation, the name and address of the applicant and the number assigned to him will be publicly announced, and the application will be filed in the order in which it was numbered.

12. All selected applications which are not correct in form and execution will be stamped "Rejected—Imperfectly Executed," and filed in the order in which they were rejected.

13. *Notices of numbers assigned* will be promptly mailed to all persons to whom they are assigned, and to their agents, in cases where numbers are assigned to soldiers who registered by agents, at the postoffice address given in their applications for registration, but no notice whatever will be sent to persons to whom numbers are not assigned. All persons who present applications for registration should, in their own behalf, employ such means as will insure their receiving prompt and accurate information as to the names of persons to whom numbers are assigned, by subscribing to some newspaper which will publish a list of successful applicants, or otherwise, as the notices sent by the Superintendent may possibly not be received by them.

14. *Notices of the time and place of making entry* will be mailed to such number of persons holding numbers as may be reasonably necessary to induce the entering of all the lands desirable for entry, and if any person who receives such a notice either notifies the Register and Receiver that he does not intend to make entry, or fails to make entry on the day assigned him for that purpose, the person holding the lowest number to whom no date for entry has been assigned will be at once notified that he will be permitted to make entry on a date named in such notice, after all persons holding numbers lower than his have had opportunity to make entry.

15. *Notice of intention not to make entry.*—If any person who receives a notice of the date on which he may make entry becomes satisfied at any time that he will not make entry under the number assigned to him, he should at once inform the Register and Receiver of that fact, in order that some other person holding a higher number may be given the right to make entry.

16. *Postoffice address.*—All persons who change their postoffice addresses from the addresses given in their applications for registration should request the postmaster at their former addresses to forward their mail to their new addresses and notify the Register and Receiver of such change of address.

17. *Method of making entry.*—Persons who receive notice of their right to make entry for Coeur d'Alene lands must present their applications at the United States land office at Coeur d'Alene, Idaho; persons who receive notice of their right to make entry for Flathead lands must present their applications either at Kalispell for Flathead lands in the Kalispell district, or at Missoula for Flathead lands in the Missoula district; and persons who receive notice of their right to make entry for Spokane lands must present their applications at Spokane. Persons holding numbers which entitle them to make

entry in more than one reservation may, at their own election, make entry in any reservation.

18. Persons holding numbers from 1 to 50 inclusive must present their applications to make entry at the land office at which they are entitled to make entry between the hours of 9 o'clock a. m. and 4.30 p. m., on April 1, 1910, in the numerical order in which their numbers were assigned to them; the applications of persons holding numbers from 51 to 100 must be similarly presented on April 2, 1910; the applications of persons holding numbers 101 to 200 must be similarly presented on April 4, 1910; the applications of persons holding numbers 201 to 300 must be presented on April 5, 1910; and so on from day to day at the rate of 100 per day, Sundays and legal holidays excepted, until all persons who have been notified to appear and make entry have been given an opportunity to do so.

19. If any person who has been assigned a number entitling him to make entry fails to appear and present his application for entry when the number assigned him is reached, his right to enter will be passed until after all other applicants assigned for that day have been disposed of, when he will be afforded another opportunity to make entry on that day, failing in which he will be deemed to have abandoned his right to make entry prior to September 1, 1910.

If any person holding a number dies before the date on which he is required to make entry, his widow, or any one of his heirs may appear and make entry under his number on that date, but not thereafter.

20. At the time of appearing to make entry, each applicant must, by affidavit, show his qualifications to make a homestead entry. If an applicant files a soldier's declaratory statement, either in person or by agent, he must furnish evidence of his military service and honorable discharge. All foreign-born persons must furnish either the original or copies of their declaration of intention to become citizens ("first papers") or copies of the order of the court admitting them to full citizenship ("second papers"). If persons who were not born in the United States claim citizenship through their fathers' naturalization while they were under twenty-one years of age, they must furnish a copy of the order of the court admitting their fathers to full citizenship (or their fathers' "second papers").

21. The usual nonmineral and nonsaline affidavits will not be required with applications to enter made prior to September 1, 1910, but evidence of the nonmineral and nonsaline character of the lands entered before that date must be furnished by the entrymen, before their final proofs are accepted.

22. *Proceedings on contests and rejected applications.*—When the Register and Receiver of the land office at which these lands will become subject to entry for any reason reject the application of any person claiming the right to make entry, under any number assigned

to him, they will at once advise him of the rejection and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise:

a. Applications either to file soldier's declaratory statement or to make homestead entry of these lands must, on presentation in accordance with these regulations, be at once accepted or rejected, but the local land officers may, in their discretion, permit amendment of defective applications during the day only on which they are presented. If properly amended on the same day entry may be permitted after the numbers for the day have been exhausted, in their numerical order.

b. No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

c. After the rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that his application, if allowed, will be subject to the disposition of the prior application, upon appeal if any be taken from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

d. Where an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will at once be carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

e. Applications filed prior to September 1, 1910, to contest entries allowed for these lands, will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior, with proper recommendation, when the matter will be promptly decided.

f. These regulations will supersede, during the period between April 1, 1910, and September 1, 1910, any Rule of Practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the lands affected by these regulations, and will apply to all appeals taken from actions of local officers during that period affecting any of these lands.

23. No notary public shall be designated for the purpose of administering oaths to applicants for registration who was not appointed prior to June 1, 1909, and on that date a resident of the county in which he shall act.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved May 24, 1909:

R. A. BALLINGER, *Secretary*.

PRESCRIBED FORMS OF APPLICATIONS FOR REGISTRATION.

I, _____, of _____
 post-office, aged _____ years, height _____ feet _____ inches, weight _____ pounds,
 in support of this, my application for registration for _____ lands
 do solemnly swear that I am a citizen of the United States, or have declared
 my intention to become such; that I am not the owner of more than 160
 acres of land, and have not heretofore made any entry or acquired any title
 to public lands which disqualifies me from making homestead entry; that I
 honestly desire to enter public lands for my own personal use as a home and
 for settlement and cultivation, and not for speculation or in the interest of some
 other person; that *I present this application for that purpose only*, and have
 not presented and will not present any other affidavit of this kind.

 The foregoing was subscribed and sworn to before me, after it was read
 to or by affiant, this _____ day of _____, 19____,
 at _____

(This Application Must be Sworn to at the Place Named in the Proclamation.)

NOTE.—Blank affidavits of this kind will be furnished by the notaries before
 whom they are sworn to. Copies must not be printed and furnished by others.

SOLDIERS' POWER OF ATTORNEY.

AGENT'S AFFIDAVIT.

I, _____, of _____
 post-office, aged _____ years, height _____ ft. _____ in. _____, and weight _____
 lbs., do solemnly swear that I am the duly appointed agent of _____
 _____, of _____ post-office,
 who desires to make entry of lands under section 2304, Revised Statutes of
 the United States, as amended by the act of March 1, 1901, at the land opening
 authorized by the proclamation issued May 22, 1909; and that I have not pre-
 sented and will not present an affidavit of this character for any other person.

 Subscribed and sworn to before this _____ day of _____, 19____,
 at _____

*(This Agent's Application Must Be Sworn to by Him at One of the Places
 Mentioned in the Proclamation.)*

SOLDIER'S AND SAILOR'S AFFIDAVIT.

I, _____ of _____
 post-office, do solemnly swear that I am qualified to make a homestead entry
 and entitled to the benefits of section 2304, Revised Statutes of the United
 States, as amended by the act of March 1, 1901; that I hereby appoint _____
 _____ my agent and attorney in fact
 to present my application for registration for the land opening authorized by
 the proclamation issued May 22, 1909, and to thereafter file a declaratory

statement for me under section 2309, Revised Statutes of the United States, for any lands embraced in said opening; that I make this affidavit *in good faith* for the sole purpose of securing public lands for a home for myself, and for the purposes of settlement and cultivation, and not for speculation; that I have not presented and will not personally present an affidavit under said proclamation nor authorize any other person than the one named above to present such an affidavit for me. *The name of my agent was written into this affidavit before it was sworn to by me.*

Subscribed and sworn to before me-----, 19-----

(*This may be sworn to before any officer using a seal, in any State or Territory.*)

NOTE.—Blank forms of this power of attorney will be furnished by the superintendent, or copies thereof which are exact reproductions, in spacing and size of type, may be printed and furnished by other persons, but they must be printed on heavy light blue paper, and be exactly three and one-quarter inches wide and five and three-quarter inches long. If an agent registers for more than one reservation he must present a power of attorney for each reservation registered for. If a soldier desires to register for two reservations he must give two powers of attorney, if for three reservations, three powers of attorney to the same or different persons. He cannot be registered for more than one reservation under one power of attorney.

FARGO GROUP No. 2 LODE CLAIMS.

Motion for review of departmental decision of January 21, 1909, 37 L. D., 404, denied by First Assistant Secretary Pierce, May 22, 1909.

ENLARGED HOMESTEAD—FORM 4-003.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 24, 1909.

The Registers and Receivers, United States Land Offices, Colorado, Montana, Nevada, Oregon, Utah, Washington, Wyoming, Arizona, and New Mexico.

GENTLEMEN: Referring to form 4-003 contained in instructions approved March 25, 1909 (37 L. D., 546), under the enlarged homestead act of February 19, 1909 (35 Stat., 639), attention has been called to the fact that it will often be difficult to procure two witnesses in the vicinity who are "well acquainted" with applicant, while witnesses may be easily procured who can testify as to the character of the lands applied for.

The important statements to be corroborated are as to the character of the lands, and it is considered unnecessary that witnesses be acquainted with the applicant.

You are, therefore, instructed that in cases where the witnesses are not acquainted with the applicant the corroborating affidavit may be modified to read as follows, to wit:

We, _____ of _____ and _____ of _____, do solemnly swear that we are well acquainted with the lands described in the above application, and personally know that the statements made by the applicant relative to the character of the said lands are true.

You will give publicity to these instructions and advise officers qualified to administer oaths in such cases in your district.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

PEDERSON *v.* PARKINSON.

Motion for review of departmental decision of March 24, 1909, 37 L. D., 522, denied by First Assistant Secretary Pierce, May 24, 1909.

ACCOUNTS-UNEARNED FEES AND OTHER TRUST FUNDS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 24, 1909.

RECEIVERS OF PUBLIC MONEYS,
United States Land Offices.

SIRS: Paragraph 5 of the circular of May 16, 1907 (35 L. D., 568), is hereby amended to read:

Applications for the return of "Unearned Fees and other Trust Funds" that have been transferred to the Treasury under the act of March 2, 1907, should be stated by the applicant in the following form:

APPLICATION FOR RETURN OF MONEYS COVERED INTO THE TREASURY AS "OUTSTANDING LIABILITIES."

I, _____, of _____, who made payment of \$ _____, in connection with _____ (Address.)
(Kind and number of application, etc.)
on _____, Receipt No. _____, hereby make application, in pursuance (Date.)
of section 4 of the act of March 2, 1907, for the return of said amount, which

has been transferred to the Treasury as "Outstanding Liabilities" under said act.

(Signature.)

UNITED STATES LAND OFFICE,

At -----,

-----, 19-----

We hereby certify that it appears from the records in this office that the statements in the foregoing application are correct, and that the amount stated was transferred to the Treasury as "Outstanding Liabilities," in pursuance of the act of March 2, 1907, in the accounts of the Receiver of Public Moneys, of the U. S. Land Office at -----, for the quarter ended -----

----- Register.

----- Receiver.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., -----, 19-----

Examined and approved. It appears from the records of this office that the statements in the foregoing application and certificate are correct, and that the amount involved has been deposited in the Treasury in accordance with the act of March 2, 1907.

Commissioner.

The register and receiver will certify, as above directed, to the correctness of the account as shown by the records of their office, and forward same to the Commissioner of the General Land Office for administrative examination, and transmittal to the Treasury Department for settlement.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

R. A. BALLINGER, *Secretary*.

RESIDENCE-LEAVE OF ABSENCE-JOINT RESOLUTION OF JANUARY
18, 1907.

ESPING *v.* JOHNSON.

The joint resolution of January 18, 1907, granting a leave of absence to homestead settlers in certain States for a period of three months from that date, protected all homestead entries within its provisions against a charge of abandonment until after the expiration of six months from the termination of the period of absence granted.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 25, 1909.* (J. F. T.)

Jens K. Johnson has appealed to the Department from your decision of March 18, 1909, sustaining the action of the local officers of

April 29, 1908, and holding for cancellation his homestead entry number 36435, made November 1, 1905, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and lots 3 and 4, Sec. 18, T. 130 N., R. 81 W., 5th P. M., Minot, North Dakota, land district, on the contest of Charles Esping.

It appears from the record that on April 22, 1907, Charles Esping filed contest affidavit against said entry, alleging—

that said entryman had wholly abandoned said land and changed his residence therefrom for more than six months last past and next prior to the date hereof; that on or about August 18, 1906, he removed with his family from said land and has been away from said land with his family ever since said date; that he has no improvements upon said land, except an uninhabitable shack and about ten acres broken.

Notice issued upon said affidavit and hearing took place before the local officers, both parties appearing in person with counsel and witnesses and submitting testimony, and on August 21, 1907, the local officers, upon consideration of the testimony submitted, recommended the dismissal of the contest. In said decision they say:

Congress, by joint resolution approved January 18, 1907, granted leave of absence to homestead settlers in the State of North Dakota and other named states for a period of three months, or until April 18, 1907. Applying the ordinary rule in the matter of a contest brought against a homestead entry where a leave of absence has been granted, it must be held that in the absence of any specific charge of default prior to the granting of such leave an entry is not subject to contest on the ground of abandonment until the expiration of six months after the time for which the leave of absence was granted. (18 L. D., 331; 26 L. D., 268.)

No appeal was taken from this decision and same became final.

On September 6, 1907, the local officers allowed Esping to file a new contest affidavit against said entry, in which he alleged that—

said entryman has wholly abandoned the said land for a period of more than one year since making said entry, and next prior to the date of the commencement of this contest; that he has never at any time established a residence upon the said land, and that he lives with his family on a rented farm forty miles from the said land and maintains a home on said rented farm, and the said homestead in Sec. 18, T. 150 N., R. 81 W., remains wholly abandoned and unimproved, except about ten acres of breaking.

September 18, 1907, Esping filed a dismissal of the first contest in the local office, but such action on his part was without effect on the rights of the parties hereto.

Notice was issued upon said second affidavit of contest and personal service thereof made upon Johnson October 15, 1907, fixing the hearing before the local officers on January 8, 1908. By agreement the hearing was continued to January 15, 1908, at which time both parties appeared with counsel and witnesses before the local officers for trial. The contestee contended that no new charge was made in said second contest affidavit, and that no charge could be made upon any

matters prior to the decision of said former contest between same parties. His contention was overruled and the trial proceeded.

It appears from the evidence that the contestee lived upon the land in controversy with his family, consisting of a wife and three children, about three months in June, July and August, 1906; that before and during said time he built a house and barn and dug and removed the stone off of more than ten acres of the land and plowed the same; also that he dug wells sufficient to obtain water, and that when he left his homestead in the latter part of August, 1906, he returned to the rented farm, about 35 miles from his homestead, for the purpose of harvesting his crop then growing on such rented land. His residence of three months upon the homestead was practically admitted in contestant's first affidavit of contest.

By joint resolution of Congress approved January 18, 1907 (34 Stat., 419), it was enacted—

That homestead settlers upon the public domain in North Dakota, South Dakota, Wyoming, Minnesota and Montana are hereby granted a leave of absence from their land for the period of three months from the date of the approval of this resolution: *Provided*, That the period of actual absence under this resolution shall not be deducted from the full time of residence required by law.

It is held in *Hiltner v. Wortler* (18 L. D., 331) that where a leave of absence is granted a homesteader under the act of March 2, 1889, a charge of abandonment will not lie against the entry until the expiration of six months after the time for which the leave of absence was granted. This holding is repeated in the case of *Jacobs v. Brigham* (26 L. D., 268), and cited with approval in *Glover v. Swarts* (29 L. D., 55), and in the case of *Katharine O. Elder* (30 L. D., 21). No reason is perceived why the leave of absence granted by act of Congress should not be construed upon the same principle to protect an entry against contest upon the charge of abandonment for the period of six months after the expiration of said leave. This entry was therefore protected against contest upon the charge of abandonment until October 18, 1907. Upon the testimony in this case no other charge than abandonment was sustained against this entry. The claimant returned to this land with his family November 15, 1907, less than thirty days after the same became subject to contest upon the ground of abandonment, and has since continued to reside upon and improve the land. This contest was begun and notice served before October 18, 1907, and claimant's delay in returning to the land beyond the time when he intended to so return is shown to have been to a considerable extent due to the expenses incurred and time spent in defending against these two contests of Esping. The attempt to couple other charges with the charge of abandonment in the second affidavit of contest subjects contestant to a just imputation,

of bad faith in attempting to obtain an allowance of his contest at a time when same should not have been entertained. In disposing of this question you say:

Even admitting that it was the purpose of said joint resolution to grant absolute protection to a homestead settler for a period of nine months, this contention in behalf of the defendant cannot avail him in this case as presented, because he appeared at the trial and made no objection to the contest on the ground that it was premature, and the facts presented at the hearing show that his abandonment of the land was from in August, 1906, until in November, 1907, a period of about fifteen months.

In the condition of this record, including these two contests by Esping, it cannot fairly be said that the question as to whether or not this contest was prematurely brought was not before the local officers at all times during the pendency of this second contest. The Department is convinced that this contest should be considered as brought upon the ground of abandonment. The facts were known to both parties and to the local officers when said second contest affidavit was presented and there has at no time been any dispute or contradiction concerning the facts involved in this controversy. The entry was not subject to contest previous to October 18, 1907, upon such charge of abandonment, and the question presented appears to be one of jurisdiction over the subject-matter of the controversy, instead of the persons of the parties interested, and therefore properly presented at any time before final disposition of the case. It follows that neither of said contests should have been entertained by the local officers and that the second contest must now be dismissed.

Your decision is accordingly reversed and said entry will be held intact subject to future compliance with law.

HOMESTEAD ENTRY—SOLDIERS' ADDITIONAL—VOIDABLE ENTRY.

EDGAR H. FOURT.

A homestead entry based upon an application executed before a commanding officer of the United States Army, under section 2293, Revised Statutes, at a time when the applicant was no longer in the military service, is not for that reason void, but voidable merely, and furnishes a sufficient basis for a soldiers' additional right under section 2306, Revised Statutes.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 25, 1909.* (J. E. W.)

Edgar H. Fourt, assignee of the heirs of Theodore Artaud, has appealed from your office decision of April 3, 1909, rejecting his application made August 19, 1907, under sections 2306-7, Revised Statutes, to enter the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 35, T. 31 N., R. 99 W., 5 P. M.,

Lander land district, Wyoming, containing 40 acres, based on the military service of Theodore Artaud, deceased, as Assistant Surgeon 55th Regiment New York Infantry, from August 28, 1861, to September 19, 1862, who is shown to have made homestead entry No. 1826 December 2, 1867, at Tallahassee, Florida, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 22, T. 35 S., R. 17 E., containing 80 acres, which was canceled for failure to make proof December 21, 1876.

It appears from the record that the entryman, Theodore Artaud, claiming to be in the military service of the United States, executed his application before the commanding officer of the 7th U. S. Infantry, at Tallahassee, Florida, under the act of March 21, 1864, section 2293, Revised Statutes, and authorized Felice Artaud, his wife, as his agent to designate the tract selected for his homestead, which she appears to have done, said application being on file before the register September 6, 1867.

It further appears that the records of the War Department show that while the said Artaud had served in the army from August 28, 1861, to September 19, 1862, at the date of said purported power of attorney, September 4, 1867, he was not in the military service of the United States.

By your office decision of January 29, 1909, you held the application of the claimant herein for rejection on the ground that the original application executed by said Artaud before the commanding officer of the 7th U. S. Infantry did not come within the provisions of section 2293, Revised Statutes, and therefore that said homestead entry No. 1826 was deemed invalid and not a proper basis for a soldiers' additional homestead entry.

March 24, 1909, a motion for review by your office of said decision was filed, alleging the same to be erroneous and that the Department had passed upon the exact point in the case at bar, reference being made to the cases of *Hollants v. Sullivan* (5 L. D., 115), in which it appeared that a homestead affidavit was made before a clerk of the court under section 2294, Revised Statutes, while neither Sullivan nor any member of his family were then residing on the land as provided for in said statute, and that of *Fidelo C. Sharp* (35 L. D., 179), wherein the homestead affidavit was executed before a clerk of a court outside the land district in which the land entered was located. In both of these cases the Department held that the entries were not void notwithstanding the irregularity in the affidavits, but were simply voidable.

Your decision of April 3, 1909, disposing of the motion for review, held that the case at bar is not analogous to either of the cases cited, on the ground that Artaud executed his homestead affidavit without any authority of law whatever, he not being in the military service of the United States at the time.

The appeal contends that you erred in not holding that the case at bar is governed by the case of Fidelo C. Sharp, *supra*, and that Artaud's entry was merely voidable and therefore a good basis for a soldiers' additional homestead entry.

In the opinion of the Department it does not appear that there is any essential difference between the irregularity between the application in the Fidelo C. Sharp case, *supra*, based upon the provisions of section 2294, Revised Statutes, and that in the application of the case at bar based upon section 2293, Revised Statutes. As in the Sharp case, that there was an entry made is not controverted. It is true the application upon which it was based was irregular and might have been rejected because not executed in accordance with the law, but the entry after allowance was not absolutely void, it was only voidable and the party with whom the voidance thereof rested was the Government and not the entryman.

As contended in the appeal the decision of the Department in the Sharp case is directly in point and should be followed in disposing of the case at bar. Undoubtedly, if Artaud had made final proof instead of abandoning his entry he would have been allowed to correct the defective original affidavit and patent would have issued; on the other hand if he had sought to make another entry it would have been held that he had exhausted his homestead rights. See case of John S. Owen (32 L. D., 262, 264).

In view of the foregoing your decision, appealed from, is hereby reversed.

REPAYMENT—INDIAN LANDS—SECTION 2, ACT OF MARCH 26, 1908.

CHARLES C. VAN WORMER.

Section 2 of the act of March 26, 1908, providing for repayment, has reference solely to moneys paid for public lands disposed of under the public land laws and covered into the Treasury and subject to the absolute control and disposition of the United States, and affords no authority for the repayment of moneys paid on Otoe and Missouri lands disposed of under the act of March 3, 1881, and placed to the credit of the Indians.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 27, 1909. (F. W. C.) (E. F. B.)

By decision of January 5, 1909, you rejected the application of Charles C. Van Wormer for repayment of what is alleged in said application to be excess purchase money paid by him August 29, 1883, and March 12, 1884, for Otoe and Missouri Indian reservation lands purchased by him under the act of March 3, 1881.

The lands in question were sold at public outcry for the benefit of the Otoe and Missouri tribes of Indians under authority of the act of March 3, 1881 (21 Stat., 380), and the proceeds of said sale were

placed in the Treasury of the United States to the credit of said Indians, bearing interest at the rate of five per cent per annum to be annually expended for the benefit of said Indians.

Appellant in support of his application relies upon section 2 of the act of March 26, 1908 (35 Stat., 48), as follows:

That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

That act has reference to payments made for public lands disposed of under the public land laws, the proceeds of which were covered into the Treasury and are subject to absolute control and disposition by the United States.

The payments made by appellant were not "under the public land laws" but were made in the purchase of Indian lands through the government as trustee, the proceeds of which were placed to the credit of said Indians for their exclusive benefit and were not public lands within the ordinary acceptance of that term. (State of Kansas v. United States, 5 L. D., 712; Five Per Cent cases, 110 U. S., 471.) Hence it affords no authority for repayment of any money from said fund.

It is therefore unnecessary to discuss the question as to whether appellant was entitled to any refund under the agreement with said Indians, ratified by the act of April 4, 1900, for a readjustment of the amounts due by delinquent purchasers of said lands.

Your decision is affirmed.

MINING CLAIM—APPLICATION FOR PATENT—OWNERSHIP.

E. J. RITTER ET AL.

While section 2325, Revised Statutes, contemplates patent proceedings upon a mining claim only by those having full possessory title at the time of the filing of the application for patent, yet in case application is filed by only one of several co-tenants, without joining the other co-tenants as parties, and legal notice of the application is given, it is incumbent upon an adverse claimant to assert his claim in the manner provided by statute; otherwise, as against that patent proceeding, he will be held to have waived his adverse claim, and the pending application will be subject to adjudication by the land department upon equitable principles.

Lackawanna Placer Claim, 36 L. D., 36, overruled.

First Assistant Secretary Pierce to the Commissioner of the General Land Office, May 27, 1909. (F. P.)

August 9, 1907, E. J. Ritter and others filed in the Durango, Colorado, land office an application for patent for the Sunnyside and other lode mining claims, and on November 20, 1907, made mineral

entry for said claims. No adverse claim or protest was filed, and the proceedings were regular in form.

The abstract of title originally submitted failing to show full record title in the applicants for patent, your office required an additional showing upon that point; and from the supplemental abstract of title thereafter filed, it appears that at the date of application for patent the applicants had not secured deeds to certain small undivided interests in the claims mentioned, although it is alleged in their application that they "have become the owners of and are in the actual possession of" the claims. Applicants subsequently secured the outstanding interests through conveyances executed May 21, June 2, and June 8, 1908.

Basing its ruling upon the ease of Lackawanna Placer Claim (36 L. D., 36), your office held the entry for cancellation on account of the apparent defect in the title at the date of application. The entrymen have appealed.

The main reason upon which the holding in the Lackawanna case was based was the possible effect that an application for patent, as in the case at bar, might have upon an undisclosed adverse claimant, and is stated thus:

Any such claimant might well hesitate to file an adverse claim as against an application for patent by one without possessory right or title to the mining claim therein embraced and incur the expense of litigation in the effort to secure a judgment which he must in advance regard as at best of doubtful force and effect as against the real owner. If the adverse claimant were so to proceed and prevail in the adverse suit, the owner could disclose his title, disavow the patent proceedings, and prevent an entry upon the judgment roll. On the other hand, if the adverse claimant were to forbear thus to interpose because of the applicant's want of title and the latter could rightfully make entry upon conveyance from the real owner subsequent to the expiration of the period of publication of notice of the application, as validating the patent proceedings, the adverse claimant would be effectually cut off from asserting his rights in the manner provided by law.

While section 2325, Revised Statutes, does not expressly require a showing of complete title at the time of filing application for patent, it is evident that in contemplation of law only those who assert the full possessory right for themselves, or for themselves and their cotenants, can avail themselves of the authority given by this section. Not every case, however, is perfectly presented, and where a defect is curable and is seasonably cured without detriment to the rights of other parties, this section should not be construed so as to defeat a claim entitled to equitable consideration.

Section 2325 requires an adverse claimant to respond to the process which is served upon him through the publication of notice of application for patent. If he fails to assert his adverse claim, he stands in default. Such an adverse claimant, when he institutes suit, must recover upon the strength of his own title, and not upon the weak-

ness of his adversary's title. *Gwillim v. Donnellan* (115 U. S., 50), The act of March 3, 1881 (21 Stat., 505); makes provision for a verdict and judgment, that neither plaintiff (adverse claimant) nor defendant (applicant for patent) has established the possessory right or title which is the foundation of the ultimate right of either to a patent.

The question, first, is whether one co-tenant in a mining claim may apply for patent, without joining all the co-tenants, and thereby invoke the jurisdiction of the land department, so as to compel adverse claimants to protect their rights in the manner provided in sections 2325 and 2326, Revised Statutes.

The right of possession as between rival claimants under the mining laws is the question to be determined by the courts in adverse proceedings under the foregoing sections. Co-tenants hold by unity of possession, and the possession of one is presumed to be for the benefit of all. So diligently do the courts hold a co-tenant to fair dealing with other co-tenants that any purchase of a hostile or outstanding title, or encumbrance upon the joint estate, by the one is held to inure to the benefit of all. *Cedar Canyon Mining Company v. Yarwood et al.* (27 Wash., 280; 67 Pac., 752); *Turner v. Sawyer* (150 U. S., 586). Sections 2325 and 2326 treat of adverse claims and provide a method for dealing with them. The undivided interest of one co-tenant is not adverse to the interest of another co-tenant in the same claim. The adverse claim contemplated by the statute must be hostile to the possession, and the right of possession, in each and all of the co-tenants. Whenever necessary of application, the remedy, as far as pretermitted co-owners are concerned, is in the land department, which, therefore, could properly take cognizance of such adjustments between the several co-owners as might be made in the interest of the pending patent proceedings. It follows, that even if but one of a number of co-tenants brings a mining claim before the land department by application for patent and the local officers assume jurisdiction and authorize notice thereof in the manner prescribed by the statute, the claimant under a rival location should adverse, in the manner prescribed, or as against that patent proceeding he will be held to have waived his claim to the area in conflict.

If the interests of pretermitted co-owners are disclosed by the record, the adverse claimant and plaintiff should make them parties defendant to his suit in the court. On the other hand, if the omission of such parties in interest in the prosecution of the patent proceedings results in a corresponding non-joinder of parties in the adverse suit, it will devolve upon the defendant or defendants to raise the question by plea in abatement or otherwise as may be appropriate under the practice and procedure of the particular jurisdiction, and thus afford the plaintiff whatever remedy in that behalf he may be

entitled to enjoy. But if the adverse claimant, instead of proceeding in the courts, elects to take the attitude of a protestant before the land department and merely call to the attention of the latter the defective title of the applicants, he comes into that jurisdiction in the position of *amicus curiae* only; not by right, but by grace. As thus presented to the land department, the case is to all intents and purposes *ex parte* in character, subject to consideration and disposition as such.

No adverse claim (in fact, no protest) has been filed in the case at bar, so that the question presented upon the record is solely between the applicants for patent and the government; and those applicants have now acquired the interests which were outstanding at the time of their application. There remains no reason, therefore, in so far as this question is concerned, for withholding approval of the pending entry.

We do not wish by this decision to encourage the practice of one co-tenant applying for patent without joining his other co-tenants, but we do specifically hold that if the register assumes jurisdiction and proceeds with the notice and no adverse claims are presented as provided by statute, all adverse claims are eliminated, and that the Department then has the right to adjudicate the case upon equitable principles. It is the duty of the register, before issuing, posting and publishing notice, to satisfy himself from the abstracts of title, the application, and other papers presented that the entire title is represented in the application and submitted for adjudication.

The case of Lackawanna Placer Claim, *supra*, is accordingly overruled, the decision of your office is reversed, and the entry will be approved and passed to patent in the absence of other objection.

RECLAMATION ACT—ENTRIES—FARM UNITS—ACT OF JUNE 27, 1906.

JEROME M. HIGMAN.

Every entry of lands within the limits of a withdrawal under the Reclamation Act is subject to reduction to a farm unit as thereafter established by the Secretary of the Interior, and improvements placed upon the different subdivisions by the entryman prior to such reduction are at his risk.

In subdividing such an entry the Secretary is not required to confine the farm units to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract or tracts lying outside of the entry so as to equalize in value the several farm units.

The act of June 27, 1906, authorizes the Secretary of the Interior to fix a lesser area than forty acres as a farm unit when "by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family," or when necessary "in order to provide for practical and economical irrigation," and there is no authority for subdividing a smallest legal subdivision under any other circumstances.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 27, 1909.* (E. F. B.)

This motion is filed by Jerome M. Higman for review of the decision of the Department of January 9, 1909 (not reported), affirming the decision of your office of July 25, 1908, requiring him to conform his homestead entry to one of the farm units embraced therein.

The land in question was withdrawn August 21, 1902, under the act of June 17, 1902 (32 Stat., 388), as land susceptible of irrigation from a contemplated irrigation project. Higman made homestead entry of the SW. $\frac{1}{4}$, Sec. 26, T. 20 N., R. 26 E., Carson City, Nevada, July 11, 1904, said land being within the limits of said withdrawal.

July 21, 1904, the entire section was withdrawn from all disposal whatever. Thereafter the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section was appropriated by the Reclamation Service, upon which it has erected buildings for offices, barracks, stables, corrals, etc., for use of the service while constructing the works, which use will be required until the completion of the project.

It does not appear that there has been any formal revocation of the withdrawal of said section for use, but on June 27, 1907, a plat of the farm units of said section was approved, which operated as a revocation of said withdrawal, except as to that part of the section appropriated by the Government as aforesaid.

Upon said plat all of the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section, except 11.05 acres in the northeast corner, is represented as a government reservation. The remaining 11.05 acres, upon which are situated the residence and other improvements of claimant, is added to the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ (not a part of claimant's entry), making farm unit D, containing 51.05 acres. The NW. $\frac{1}{4}$ of said NW. $\frac{1}{4}$ has been combined with the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ (which also is outside of the entry) as farm unit C, containing 79.02 acres. The remaining part of the entry, being the south half thereof, is designated as farm unit D, containing 86.03 acres, but this is divided by a triangular strip subject to a railroad right of way, and is the only farm unit composed wholly of parts of the entry.

When this entry was made the land had been withdrawn as irri-gable land lying under the Truckee-Carson project under authority of the act of June 17, 1902, which expressly provides that it shall be "subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than 160 acres," and it is further provided that all entries made during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of the act.

Every entry of lands within the limits of such withdrawals is subject to reduction to such limit or area as the Secretary of the Interior

may determine will be reasonably required for the support of a family. That is one of the terms, conditions and limitations upon which the entry is allowed. The authority is expressly conferred by the 4th section of the act. The only limitation upon such power is that the lands must be entered under the provisions of the homestead law "*in tracts of not less than 40 nor more than 160 acres,*" except as hereinafter mentioned, and every entry must be of contiguous tracts, as any other form of entry would violate the provisions of the homestead law. See Instructions, 32 L. D., 6; *Ib.*, 238.

Hence, when Higman's entry was allowed it was upon the condition that it might be reduced to a forty-acre tract, and whatever improvements he may have placed upon the different subdivisions were at his risk. That was a condition which he accepted when his entry was made.

If the only complication in this case was the subdivision of the entry into farm units there would be no difficulty, as Higman will be compelled to adjust his entry to one of the farm units, and upon failure to elect, the Department will adjust it for him.

Uniformity of area is not required by the act, and when an entry has been allowed of lands within the limits of a withdrawal subject to reduction of area, the Secretary in subdividing such entry is not required to confine the farm units to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract or tracts lying outside of the entry so as to equalize in value the several farm units.

The authority to limit the acreage of each entry to the extent required for the support of a family necessarily implies the power to ascertain the productive value of each subdivision, and of its relative value to other subdivisions. As the lands under any one project may be unequal in value and may vary in character, the determination of what quantity of land may reasonably be required for the support of a family cannot be intelligently arrived at in the absence of information as to the productive capacity of every subdivision. It is therefore apparent that it was not the intention of Congress that there should be a uniform limit of area under each project, regardless of the character and quality of the different subdivisions, but rather that it was the intention to confer upon the Secretary the power to fix the limit of area of each entry under the same project according to the quality and character of the land with reference to its productive value. [Instructions, 32 L. D., 238.]

The Reclamation Service has appropriated for use one of the legal subdivisions (NE. $\frac{1}{4}$ SW. $\frac{1}{4}$), thus eliminating it from the entry, and, as to that tract, the entry was held for cancellation by your office October 15, 1906, upon the recommendation of the Reclamation Service, with the request that the entryman be advised that compensation for his improvements would be determined in the usual manner.

The 8th section of the instructions of June 6, 1905 (33 L. D., 607), provides that in the event any land embraced in an entry upon which final proof has not been made is needed for use in the construction

and maintenance of any irrigation work, the Government may cancel such entry and appropriate the land to its use after paying the value of the improvements and the enhanced value of the land covered by such improvements.

By the 9th section of said instructions, it is provided that if the owner of the improvements and the representative of the Government shall fail to agree as to the amount to be paid, the value shall be ascertained by the appraisement of disinterested freeholders, one to be selected by the owner, one by the Government and a third by the two thus chosen, and no entry shall be canceled, or the land embraced therein so appropriated until the amounts thus ascertained or agreed upon have been paid to the owner thereof.

From the correspondence in this case it is apparent that the engineer in charge of the works could never agree with Higman upon the terms of settlement and that with each effort they were becoming so embittered toward each other as to make a settlement between those parties by agreement impossible.

Higman on November 22, 1906, nominated his appraiser and notified the engineer thereof. No appraiser was nominated on behalf of the Government, but thereafter the Reclamation Service submitted for approval a plat of farm units covering said section, upon which is shown an irregular-shaped tract of about three fourths of the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, leaving a small fraction of said subdivision as irrigable land, which, as before stated, is combined with the forty acres adjoining in the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ as farm unit D.

In reporting upon the plat the engineer says:

In making up our farm unit map we surveyed carefully the land needed for our buildings; cut out the irregular-shaped portions shown on our map to be reserved for our purposes. This piece of land includes no improvements made by Mr. Higman up to the time at which it was surveyed, and does include all the Reclamation Service buildings and all land we need for our purposes.

The effect of this action, whether it was so intended or not, was to evade payment to Higman for the value of his improvements on said subdivision. The Government had already appropriated said tract and the entry as to that part had been held for cancellation upon request of the Reclamation Service.

At the time it was so appropriated there was "no authority to subdivide a forty acre tract for combination with other subdivisions." Instructions, 32 L. D., 237, 239.

The Secretary may limit the area per entry to the smallest legal subdivision, or may combine with it one or more legal subdivisions, provided the entry will not exceed 160 acres; but he has no power to subdivide or change the ordinary subdivisions fixed by law.

The act of June 27, 1906 (34 Stat., 519), authorizes the Secretary of the Interior to fix a lesser area than forty acres as a minimum

entry, but it is only when in his opinion, "by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family."

He may also make irregular subdivisions where it may be necessary "in order to provide for practical and economical irrigation."

It is evident that the subdivision of Higman's entry was not controlled by such conditions, and hence no authority can be found in the act of June 27, 1906, for subdividing or changing the smallest legal subdivision fixed by law in violation of the instructions above referred to.

In a letter from the Director of the Geological Survey December 22, 1905, it was stated that "it is understood the entryman has no improvements on this forty-acre tract (NE. $\frac{1}{4}$ SW. $\frac{1}{4}$) for which he should be compensated." Again, by letter of June 28, 1906, that statement was repeated and it was further stated: "His residence and improvements are said to be on the remaining portion of the land covered by his entry." It is also claimed by the engineer, and so reported by the Director of the Geological Survey, that the construction of the buildings on said tract was commenced by the Reclamation Service before the date of Higman's entry.

The Director of the Reclamation Service in his letter of July 17, 1908, also advised your office as follows:

It appears that the former supervising engineer in charge of the Truckee-Carson project being of the opinion that there was fraud in connection with the filing of the entry, did not take any action looking to the appointment of an appraiser on behalf of the United States as provided by the General Land Office Circular of June 6, 1905.

It does not appear upon what ground the engineer believed the entry to be fraudulent, but no retraction of any of the foregoing statement appears to have been made, unless it may be inferred from the recommendation of the engineer in charge "that Mr. Higman be called on to conform to farm units immediately and if he does not do this that the land office arbitrarily conform his entry to one farm unit."

If there is any foundation for the charge that the entry is fraudulent it ought to be investigated, and if found to be true the entry ought to be canceled in its entirety. And even if it was not fraudulent, if Higman commenced to improve the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section after the Government had commenced its buildings he was chargeable with notice of such appropriation and must remove his buildings. Or, if his improvements are not upon that subdivision, the fact ought to be established and not rest upon mere conjecture.

If the charges are still made by the Reclamation Service, a hearing should be ordered before the local officers to determine the truth or

falsity of the same. If the improvements of the entryman are not on this subdivision, or if they were made after the appropriation by the Government, he is not entitled to any compensation for his improvements.

In on the contrary he had improved the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ after entry and before any appropriation was made by the Government, the entry should be canceled as to the entire NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and he should be compensated for the value of such improvements as were placed on the subdivision prior to the time of the government appropriation, unless the entire subdivision is restored by the Government. The tract should either be taken or released, and if taken it must be taken in its entirety, and if released the farm unit necessarily changed.

Higman must adjust his entry to a farm unit as finally fixed hereunder.

Departmental decision of January 9, 1909, is modified accordingly, and the papers are remanded to your office for readjudication in conformity with the views herein announced after conference with the Reclamation Service.

HEIRS OF DEWOLF v. MOORE.

Motion for review of departmental decision of August 10, 1908, 37 L. D., 110, denied by First Assistant Secretary Pierce May 28, 1909.

COAL LAND—OPENING OF A MINE—DRILL HOLES—DECLARATORY STATEMENT.

THAD STEVENS ET AL.

The mere penetration of a bed of coal by means of a drill so small that the work can not be utilized in the mining of coal from the land is not in itself the opening and improving of a mine or mines thereon within the contemplation of the statute, and a preference right of entry is not thereby acquired.

The office of the declaratory statement is not to create, but is solely to preserve, a preference right of entry, theretofore acquired by the opening and improving of a mine or mines of coal; and if the right does not exist, the declaratory statement has no office to perform and is without force or effect for any purpose.

First Assistant Secretary Pierce to the Commissioner of the General
(F. W. C.) *Land Office, May 28, 1909.* (F. H. B.)

Thad Stevens, Clarence L. Chapman and Thomas F. Hotchkiss have severally appealed from your office decision of February 6, 1909, whereby each is adjudged to have initiated or acquired no right or claim under the coal-land law, and whereby you reject the application

of each to acquire under that law the paramount title, to the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 25, T. 57 N., R. 85 W., Buffalo, Wyoming, land district.

The following facts, which exhibit the respective asserted claims of the parties to the land in question, are in substance as they were also found by the local officers and your office:

March 27, 1905, Stevens filed a coal declaratory statement, covering the land and alleging possession thereof by him; and on May 17, 1906, he tendered his application to purchase, accompanied by the purchase price (\$3,200); which were accepted by the local officers. At that point action was suspended by the officers, pending notice to each coal declarant concerned, but on June 3, 1907, Stevens's entry was placed of record. Receiver's formal receipt issued at that time, although the final certificate of entry apparently was withheld.

April 9, 1906, Hotchkiss filed a coal declaratory statement, covering the same land, and on January 17, 1907, tendered an application to purchase, which was rejected by the local officers on the ground that the land had been included in a withdrawal from entry, by executive order, July 31, 1906, as containing workable coal.

July 2, 1906, Chapman filed a coal declaratory statement, also covering the above-described land, and on May 4, 1907, presented his application to purchase, which appears to have been accepted but held in suspension to await an adjustment of the conflicting claims.

Pursuant to an order of your office, a hearing was had, at which all the parties appeared and a special agent was present, and at which a considerable amount of evidence was adduced.

Reviewing the record as thus made up, the local officers, after reciting substantially the foregoing facts, found it to appear "from the testimony presented that none of said parties had, at the time of filing their several coal declaratory statements, opened or improved a mine of coal on the land in question," but—

That about the month of February, 1906, Stevens caused a bore hole to be sunk upon said land, resulting in developing a vein of coal of merchantable value; that about the month of May, 1906, said Hotchkiss sunk a bore hole upon the land, but the testimony is silent as to what was discovered; that about the same period some surface development was made; that after the date of filing his declaratory statement said Chapman did some surface development on said land and later sunk a bore hole thereon, developing a vein of coal about 35 feet in thickness; that he erected a house on the land and made an attempt to fence same, which attempt was resisted by the claimant Hotchkiss, who destroyed portion of the fence and moved the house; and it further appears that even up to the present time no actual mine of coal has been developed on said land, although the character of the land has been fully determined to be coal land through the developments made by each of the claimants.

Also observing that, whilst considerable evidence was offered which would appear to indicate that Stevens had not sought to acquire title

to the land in his own behalf, but in the interest of the Wyoming Coal Mining Company, the evidence was not deemed sufficient to warrant a finding to that effect, the local officers concluded:

It is therefore the opinion of this office that said Hotchkiss had not, at the date of the application to purchase of Stevens, acquired any rights in and to said land which would in any way defeat the right initiated by said Stevens, and further that by his failure to diligently prosecute his improvement and maintain his possession of said land as hereinbefore set out that he thereby allowed the application of Chapman to supersede the rights acquired by him therein; that as between Chapman and Stevens as claimants to this land it is the opinion of this office that the right of purchase should be awarded to Thad Stevens as being the prior applicant, and against whom the charge of fraud was not satisfactorily proven.

Upon appeals by Hotchkiss and Chapman, and by the decision first above mentioned, your office, upon essentially the same findings of fact as those made by the local officers, although more in detail, and citing in that connection *McKibben v. Gable* (34 L. D., 178) and the unreported departmental decision of April 5, 1907, in the case of *Louis Hotop v. Charles M. Lathrop*, with reference to the acquisition of a preference right of entry under the coal-land law, adjudged that no such preferential right had been acquired, wherefore "no claim or right in any of the parties can be recognized," and for that reason held the respective applications for rejection.

As the evidence is read and understood by the Department, upon the pending appeals, it is deemed to sustain in all essential particulars the findings of fact above indicated, so that it only becomes necessary to consider the decision which your office has predicated upon those facts.

In the case of *Hotop v. Lathrop*, *supra*, which was cited in the course of your opinion, one of the parties claimed a preference right of purchase by reason of the fact that from the surface of the land involved he had bored a two-and-one-half-inch auger hole down to and through a bed of coal about five and a half feet in thickness. Said the Department:

The mere penetration of a bed of coal by means of a drill so small that the work could not be utilized in the mining of coal from the land is not in itself the opening and improving of a mine or mines thereon within the contemplation of the statute; and having failed to bring himself within that purview Hotop could in no event have acquired a preference right to be preserved by his declaratory statement or which would bar a purchase by another.

To that view the Department adheres. The provision of section 2348, Revised Statutes, that those "who have opened and improved . . . any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry," is deemed to have been intended to set a premium upon, or reward in that manner, the opening up of such lands for the

potential production of coal therefrom. A bore hole of such diameter as was relied upon in that case would serve no such purpose, obviously, and would but serve affirmatively to demonstrate the presence of the coal, the existence of which must be proven in some appropriate manner in any case, whether the application to purchase and enter be in the exercise of a preference right or otherwise. Of the same character are the several holes drilled upon the land involved in the case at bar, and the effect of the evidence is that no mine of coal was otherwise actually opened. None of the parties, therefore, can be held to have acquired a preference right, and their respective declaratory statements were accordingly of no legal force or effect. This phase of the law was considered in *McKibben v. Gable*, *supra*, in which it was directly held that the office of the declaratory statement is not to create, but is solely to preserve, a preference right of entry, theretofore acquired by the opening and improvement of a mine or mines of coal; and, therefore, if the right does not exist, the declaratory statement has no office to perform and is without force or effect for any purpose.

But the record discloses that on May 17, 1906, and prior to the executive order of withdrawal (July 31, 1906) embracing the land, Stevens filed his application to purchase and paid the purchase price—a fact recited both by the local officers and your office. At that date, therefore, so far as appears from the record, there was no bar to his entry except the presence in the files of the declaratory statement of Hotchkiss; and the result of the hearing in the case has been to dispose of that declaratory statement, with the others, as of no legal effect at any time.

It thus remains to consider the status of Stevens, with respect to the land, under his application to purchase and his payment; and in this connection, touching the effect of the above-mentioned coal-land withdrawal, it should be observed that by the subsequent, amendatory executive order of January 15, 1907 (35 L. D., 395), it was provided as follows:

Nothing in any withdrawal of lands from coal entry heretofore made shall impair any right acquired in good faith under the coal-land laws and existent at the date of such withdrawal.

Notwithstanding Stevens's application and payment of May 17, 1906, your office enters a comprehensive judgment of rejection, to the effect that, inasmuch as no preference right of entry had been acquired and preserved under any of the declaratory statements, no claim of or right in any of the parties can be accorded recognition; and this, notwithstanding also that the judgment includes an adjudication of the invalidity of every assertion of adverse interest at the date of that application and payment.

But the existence of a preference right of entry, as asserted in his declaratory statement, was not an essential foundation of Stevens's application to purchase. As was said in the case of Charles S. Morrison, on review (36 L. D., 319), citing McKibben *v.* Gable, *supra*, and Lehmer *v.* Carroll (34 L. D., 447), "under the law the way is equally open to purchase and entry without a preference right, or without its assertion if acquired," or after its termination. Unless, therefore, Stevens's application was open to objection on some ground independent of his claimed preferential right, your office erred in holding it for rejection.

In that behalf, then, it is enough to say that by the record it appears that at the date of his application to purchase there existed no valid adverse interest to bar its allowance; that, for aught that is shown to the contrary, the application was presented in good faith and in accordance with the law; and that it was the first in the order of presentation and preceded the general executive order of withdrawal, so that it falls within the purview of the amendatory order of January 15, 1907, *supra*.

The decision of your office is modified accordingly, and the claim of Stevens may be perfected and approved for patent if no other objection shall appear.

UNITED STATES MINING LAWS,

AND REGULATIONS THEREUNDER, RELATIVE TO THE RESERVATION, EXPLORATION, LOCATION, POSSESSION, PURCHASE, AND PATENTING OF THE MINERAL LANDS IN THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

LAWS.

TITLE XXXII, CHAPTER 6, REVISED STATUTES.

Mineral Lands and Mining Resources.

Mineral lands reserved. SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.
4 July, 1866, c. 166, s. 5, v. 14, p. 86.

Mineral lands open to purchase by citizens. SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.
10 May, 1872, c. 152, s. 1, v. 17, p. 91.

Length of mining claims upon veins or lodes. SEC. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one of more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the

limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Proof of citizenship.

10 May, 1872,
c. 152, s. 7, v.
17, p. 94.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Locators' rights of possession and enjoyment.

10 May, 1872,
c. 152, s. 3, v.
17, p. 91.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of

Owners of tunnels, rights of.

10 May, 1872,
c. 152, s. 4, v.
17, p. 92.

the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid, but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Regulations
made by min-
ers.

10 May, 1872,
c. 152, s. 5, v.
17, p. 92.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures.

Patents for
mineral lands,
how obtained.

10 May, 1872,
c. 152, s. 6, v.
17, p. 92.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has,

or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question

Adverse
claim, proceed-
ings on.

10 May, 1872,
c. 152, s. 7, v.
17, p. 93.

of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

Description
of mining vein
or lode claims.

10 May, 1872,
c. 152, s. 8, v.
17, p. 94.

Amended
Apr. 28, 1904
(33 Stat., 545).

Patents to
conform to
official monu-
ments.

Monuments
to govern de-
scriptions.

SEC. 2327. The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

SEC. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

Pending applications; existing rights.

10 May, 1872, c. 152, s. 8, v. 17, p. 94.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Conformity of placer claims to surveys, limit of.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Subdivisions of ten-acre tracts; maximum of placer locations.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

Conformity of placer claims to surveys, limitation of claims.

10 May, 1872, c. 152, s. 10, v. 17, p. 94.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this

What evidence of possession, &c., to establish a right to a patent.

9 July, 1870, c. 235, s. 13, v. 16, p. 217.

chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Proceedings
for patent for
placer claim,
&c.

10 May, 1872,
c. 152, s. 11, v.
17, p. 94.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Surveyor-
general to ap-
point survey-
ors of mining
claims, &c.

10 May, 1872,
c. 152, s. 12, v.
17, p. 95.

SEC. 2334. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the

other papers in the case, to the Commissioner of the General Land Office.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

SEC. 2337. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors

Verification
of affidavits,
&c.

10 May, 1872,
c. 152, s. 13, v.
17, p. 95.

Where veins
intersect, &c.

10 May, 1872,
c. 152, s. 14, v.
17, p. 96.

Patents for
nonmineral
lands, &c.

10 May, 1872,
c. 152, s. 15, v.
17, p. 96.

What condi-
tions of sale
may be made
by local legis-
lature.

26 July, 1866,
c. 262, s. 5, v.
14, p. 252.

Vested rights
to use of water
for mining, &c.;
right of way
for canals.

26 July, 1866,
c. 262, s. 9, v.
14, p. 253.

and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Patents, pre-
emptions, and
homesteads
subject to vested
and accrued
water rights.

9 July, 1870,
c. 235, s. 17, v.
16, p. 218.

Mineral
lands in which
no valuable
mines are dis-
covered open
to homesteads.

26 July, 1866,
c. 262, s. 10, v.
14, p. 253.

Mineral
lands, how set
apart as agri-
cultural lands.

26 July, 1866,
c. 262, s. 11, v.
14, p. 253.

Additional
land districts
and officers,
power of the
President to
provide.

26 July, 1866,
c. 262, s. 7, v.
14, p. 252.

Provisions of
this chapter
not to affect
certain rights.

10 May, 1872,
c. 152, s. 16, v.
17, p. 96.
9 July, 1870,
c. 235, s. 17, v.
16, p. 218.

SEC. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

SEC. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."

SEC. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to preemption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

SEC. 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

SEC. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of preemption as other public lands.

Mineral lands in certain States excepted.

18 Feb., 1873, c. 159, v. 17, p. 465.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Grant of lands to States or corporations not to include mineral lands.

30 Jan., 1865, Res. No. 10, v. 13, p. 567.

ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

AN ACT To amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

Claim located prior to May 10, 1872, first expended, extended to 1, 1875.

Act of Congress approved June 6, 1874 (18 Stat. L., 61).

AN ACT To amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so

Money expended in a tunnel considered as expended on the lode.

Act of Congress approved February 11, 1875 (18 Stat. L., 315).

expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

AN ACT To exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Missouri and Kansas excluded from the operation of the mineral laws.

Act of Congress approved May 5, 1876 (19 Stat. L., 52).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands.

AN ACT Authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Citizens of Colorado, Nevada, and the Territories authorized to fell and remove timber on the public domain for mining and domestic purposes.

Act of Congress approved June 3, 1878 (20 Stat. L., 88).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid

and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

AN ACT To amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, That this section shall apply to all applications now pending for patents to mineral lands."

Application for patent may be made by authorized agent.

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

On unpatented claims period commences on Jan. 1 succeeding date of location.

Act of Congress approved Jan. 22, 1880 (21 Stat. L., 61).

AN ACT To amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

In action brought title not established in either party.

Act of Congress approved Mar. 3, 1881 (21 Stat. L., 505).

AN ACT To amend section twenty-three hundred and twenty-six of the Revised Statutes in regard to mineral lands, and for other purposes.

Adverse claim may be verified by agent.

Sec. 1, act of Congress approved Apr. 26, 1882 (22 Stat. L., 49).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Affidavit of citizenship; before whom made.

Sec. 2, act of Congress approved Apr. 26, 1882 (22 Stat. L., 49).

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

AN ACT To exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Alabama excepted from the operation of the mineral laws.

Act of Congress approved Mar. 3, 1883 (22 Stat. L., 487).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

AN ACT Providing a civil government for Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Mining laws extended to the district of Alaska.

Act of Congress approved May 17, 1884 (23 Stat. L., 24).

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public

moneys, and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. * * *

Right of entry under all the land laws restricted to 320 acres. (Repealed, see act Mar. 3, 1891, sec. 17).

Reservation in patents for right of way for ditches and canals constructed.

Act of Congress approved Aug. 30, 1890 (26 Stat. L., 371).

AN ACT To repeal the timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Town sites
on mineral
lands author-
ized.

Lands en-
tered under
the mineral
laws not in-
cluded in re-
striction to 320
acres.

Act of Con-
gress approved
Mar. 3, 1891
(26 Stat. L.,
1095).

SEC. 16. That town-site entries may be made by in-
corporated towns and cities on the mineral lands of the
United States, but no title shall be acquired by such
towns or cities to any vein of gold, silver, cinnabar, cop-
per, or lead, or to any valid mining claim or possession
held under existing law. When mineral veins are pos-
sessed within the limits of an incorporated town or city,
and such possession is recognized by local authority or
by the laws of the United States, the title to town lots
shall be subject to such recognized possession and the
necessary use thereof, and when entry has been made or
patent issued for such town sites to such incorporated
town or city, the possessor of such mineral vein may enter
and receive patent for such mineral vein, and the surface
ground appertaining thereto: *Provided*, That no entry
shall be made by such mineral-vein claimant for surface
ground where the owner or occupier of the surface
ground shall have had possession of the same before the
inception of the title of the mineral-vein applicant.

SEC. 17. That reservoir sites located or selected and to
be located and selected under the provisions of "An act
making appropriations for sundry civil expenses of the
Government for the fiscal year ending June thirtieth,
eighteen hundred and eighty-nine, and for other pur-
poses," and amendments thereto, shall be restricted to and
shall contain only so much land as is actually necessary
for the construction and maintenance of reservoirs, ex-
cluding so far as practicable lands occupied by actual
settlers at the date of the location of said reservoirs, and
that the provisions of "An act making appropriations
for sundry civil expenses of the Government for the
fiscal year ending June thirtieth, eighteen hundred and
ninety-one, and for other purposes," which reads as fol-
lows, viz: "No person who shall after the passage of this
act enter upon any of the public lands with a view to
occupation, entry, or settlement under any of the land
laws shall be permitted to acquire title to more than three
hundred and twenty acres in the aggregate under all said
laws," shall be construed to include in the maximum
amount of lands the title to which is permitted to be
acquired by one person only agricultural lands and not
include lands entered or sought to be entered under
mineral land laws.

* * * * *

AN ACT To authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Entry of lands chiefly valuable for building stone under the placer-mining laws.

Act of Congress approved Aug. 4, 1892 (27 Stat. L., 348).

AN ACT To amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-three: *Provided,* That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however,* That the provisions of this act shall not apply to the State of South Dakota.

Requirement of proof of expenditure for the year 1893 suspended except as to South Dakota.

Act of Congress approved Nov. 3, 1893 (28 Stat. L., 6).

This act shall take effect from and after its passage.

AN ACT To amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be

Requirement of proof of expenditure for the year 1894 suspended except as to South Dakota.

Act of Congress approved July 18, 1894 (28 Stat. L., 114).

suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

AN ACT Making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-six, and for other purposes.

[WICHITA LANDS, OKLAHOMA.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

<p>Lands ceded. Act of Mar. 2, 1895 (28 Stat. L., 876, 894, 899).</p>	<p>The said Wichita and affiliated bands of Indians in the Indian Territory hereby cede, convey, transfer, relinquish, forever and absolutely, without any reservation whatever, all their claim, title and interest of every kind and character in and to the lands embraced in the following-described tract of country in the Indian Territory, to wit:</p>
---	--

Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of said river to the line of ninety-eight degrees forty minutes west longitude, thence on said line of ninety-eight degrees forty minutes due north to the middle of the channel of the main Canadian River, thence down the middle of said main Canadian River to where it crosses the ninety-eighth meridian, thence due south to the place of beginning.

* * * * *

<p>Mineral laws.</p>	<p>That the laws relating to the mineral lands of the United States are hereby extended over the lands ceded by the foregoing agreement.</p>
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AN ACT Making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes.

* * * * *

[FORT BELKNAP INDIAN RESERVATION, MONTANA.]

SEC. 8.

* * * * *

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That said lands shall be sold at ten dollars per acre: *And provided further*, That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey. * * *

Provisos.
Price.
No occupancy
prior to open-
ing.

[BLACKFEET INDIAN RESERVATION, MONTANA.]

SEC. 9.

* * * * *

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey.

Proviso.
No occupancy
prior to open-
ing.

[SAN CARLOS INDIAN RESERVATION, ARIZONA.]

SEC. 10.

* * * * *

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be opened to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: *Provided, however*, That any person who in good faith prior to the passage of this

Provisos.
No occupancy
prior to open-
ing.

Preference to
discoverers of
coal, etc.

Act of Congress approved June 10, 1896 (29 Stat. L. 353, 357, 360).

act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

AN ACT To authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws.

Act of Congress approved Feb. 11, 1897 (29 Stat. L., 526).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

* * * * *

Act of Congress approved June 4, 1897 (30 Stat. L., 34, 35, 36).

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

Forest reservations, when to be established.

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * *

Use of timber, etc., by settlers, etc.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, pros-

pecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

Egress and ingress of settlers within reservations, etc.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

Restoration of mineral or agricultural lands to the public domain.

AN ACT Extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes.

SEC. 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States, or persons who have declared their intention to become such, may enjoy in said district of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect.

Mining rights in Alaska to native-born citizens of the Dominion of Canada.

Act of Congress approved May 14, 1898 (30 Stat. L., 415).

AN ACT Making further provisions for a civil government for Alaska,
and for other purposes.

* * * * *

What record-
ed.

Act of Con-
gress approved
June 6, 1900
(31 Stat. L.,
321, 326, 330).

SEC. 15. The respective recorders shall, upon the pay-
ment of the fees for the same prescribed by the Attorney-
General, record separately, in large and well-bound sepa-
rate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or con-
vey real estate and mortgages of real estate, releases of
mortgages, powers of attorney, leases which have been
acknowledged or proved, mortgages upon personal prop-
erty;

* * * * *

Ninth. Affidavits of annual work done on mining
claims;

Tenth. Notices of mining location and declaratory
statements;

Proviso.
M i n i n g
claims.

Where in-
struments re-
corded.

Eleventh. Such other writings as are required or per-
mitted by law to be recorded, including the liens of me-
chanics, laborers, and others: *Provided*, Notices of loca-
tion of mining claims shall be filed for record within
ninety days from the date of the discovery of the claim
described in the notice, and all instruments shall be re-
corded in the recording district in which the property or
subject-matter affected by the instrument is situated, and
where the property or subject-matter is not situated in
any established recording district the instrument affect-
ing the same shall be recorded in the office of the clerk
of the division of the court having supervision over the
recording division in which such property or subject-
matter is situated.

* * * * *

Proviso.
M i n e r s ' r e g -
u l a t i o n s f o r
r e c o r d i n g , e t c .
—recorder.

Records a t
D y e a , e t c . , l e -
g a l i z e d .

* * * *Provided*, Miners in any organized mining
district may make rules and regulations governing the
recording of notices of location of mining claims, water
rights, flumes and ditches, mill sites and affidavits of
labor, not in conflict with this act or the general laws of
the United States; and nothing in this act shall be con-
strued so as to prevent the miners in any regularly organ-
ized mining district not within any recording district
established by the court from electing their own mining
recorder to act as such until a recorder therefor is ap-
pointed by the court: *Provided further*, All records heret-
ofore regularly made by the United States commissioner
at Dyea, Skagway, and the recorder at Douglas City, not
in conflict with any records regularly made with the
United States commissioner at Juneau, are hereby legal-
ized. And all records heretofore made in good faith in
any regularly organized mining district are hereby made
public records, and the same shall be delivered to the re-
corder for the recording district including such mining
district within six months from the passage of this act.

SEC. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the district of Alaska: *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permits shall be granted by the Secretary of War authorizing any person or persons, corporation, or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation; and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the district of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

Mining laws.

Provisos.
Gold, etc. Ex-
plorations on
Bering Sea.

—miners' regu-
lations.

—not to con-
flict with Fed-
eral laws.

Exclusive per-
mits to mine
void, etc.

Provision re-
serving road-
way, etc., not
to apply. Vol.
30, p. 413.

An ACT To ratify an agreement with the Indians of the Fort Hall Reservation in Idaho, and making appropriations to carry the same into effect.

Act of Con-
gress approved
June 6, 1900
(31 Stat. L.,
680).

[DISPOSITION OF COMANCHE, KIOWA, AND APACHE LANDS.]

That should any of said lands allotted to said Indians, or opened to settlement under this act, contain valuable mineral deposits, such mineral deposits shall be open to location and entry, under the existing mining laws of the United States, upon the passage of this act, and the mineral laws of the United States are hereby extended over said lands.

AN ACT Extending the mining laws to saline lands.

Mining laws
extended to sa-
line lands.

Act of Con-
gress approved
Jan. 31, 1901
(31 Stat. L.,
745).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: *Provided,* That the same person shall not locate or enter more than one claim hereunder.

AN ACT Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

Utah and
White River
Utes.
Allotment of
irrigable land.

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Utah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the

Unallotted
lands restored
to public do-
main.

Provisos.
Homestead
entries.

Mineral
leases.

Raven Min-
ing Company.

Application
of proceeds
from sales.

Act of Con-
gress approved
May 27, 1902
(32 Stat. L.,
263).

foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians.

* * * * *

AN ACT Defining what shall constitute and providing for assessments on oil mining claims.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: *Provided*, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims.

Assessment
required for
oil mining
claims.

Act of Congress approved
Feb. 12, 1903
(32 Stat. L.,
825).

AN ACT Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * *

That in the lands within the former Uncompahgre Indian Reservation, in the State of Utah, containing gilsonite, asphaltum, elaterite, or other like substances, which were reserved from location and entry by provision in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June seventh, eighteen hundred and ninety-seven, all discoveries and locations of any such mineral lands by qualified persons prior to January first, eighteen hundred and ninety-one, not previously discovered and located, who recorded notices of such discoveries and locations prior to January first, eighteen hundred and ninety-one, either in the State of Colorado, or in the office of the county recorder of Uintah County, Utah, shall have all the force and effect accorded by law to locations of mining claims upon the public domain. All such locations may hereafter be perfected, and patents shall be issued therefor upon compliance with the requirements of the mineral-land laws, provided that the owners of such locations shall relocate their respective claims and record the same in the office of the county recorder of Uintah County, Utah, within ninety

Uncompahgre
Indian Reservation.

Mining
claims located
on prior to Jan.
1, 1891, valid.

30 Stat., p.
87.

Patents to issue
on relocations,
etc., of
claims.

Claims located after Jan. 1, 1891, invalid.

Sale of remainder of mineral lands.

Restrictions.

Act of Congress approved Mar. 3, 1903 (32 Stat. L., 998).

days after the passage of this act. All locations of any such mineral lands made and recorded on or subsequent to January first, eighteen hundred and ninety-one, are hereby declared to be null and void; and the remainder of the lands heretofore reserved as aforesaid because of the mineral substances contained in them, in so far as the same may be within even-numbered sections, shall be sold and disposed of in tracts not exceeding forty acres, or a quarter of a quarter of a section, in such manner and upon such terms and with such restrictions as may be prescribed in a proclamation of the President of the United States issued for that purpose not less than one hundred and twenty days after the passage of this act, and not less than ninety days before the time of sale or disposal, and the balance of said lands and also all the mineral therein are hereby specifically reserved for future action of Congress.

* * * * *

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

* * * * *

Classification, etc., of lands.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisalment said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

* * * * *

Disposal of lands.

SEC. 8. That when said commission shall have completed the classification and appraisalment of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. * * *

* * * * *

Mineral land entries.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie

evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

Proviso.
Exceptions.

AN ACT To ratify and amend an agreement with the Indians of the Crow Reservation, in Montana, and making appropriations to carry the same into effect.

Act of Congress approved
Apr. 23, 1904
(33 Stat. L., 302).

* * * * *

SEC. 5. * * * *And provided further*, That the price of said lands shall be four dollars per acre, when entered under the homestead laws. * * * Lands entered under the town-site and mineral land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws. * * *

Town-site
and mineral
lands.

Act of Congress approved
Apr. 27, 1904
(33 Stat. L., 352).

AN ACT To authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington.

* * * * *

SEC. 3. That the residue of the lands of said reservation—that is, the lands not allotted and not reserved—shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the mineral lands, which need not be appraised, and the timber on the lands classified as timber lands shall be appraised separately from the land. The basis for the appraisal of the timber shall be the amount of standing merchantable timber thereon, which shall be ascertained and reported.

Appraisal of
unallotted
lands, etc.

* * * * *

The lands classified as mineral lands shall be subject to location and disposal under the mineral-land laws of the United States: *Provided*, That lands not classified as mineral may also be located and entered as mineral lands, subject to approval by the Secretary of the Interior and conditioned upon the payment, within one year from the date when located, of the appraised value of the lands per acre fixed prior to the date of such location, but at not less than the price fixed by existing law for mineral lands: *Provided further*, That no such mineral locations shall be permitted on any lands allotted to Indians in severalty or reserved for any purpose as herein authorized.

Mineral
lands.

Provisos.
Lands not
classified as
mineral lands.

Restriction.
Act of Congress approved
Dec. 21, 1904
(33 Stat. L., 595).

AN ACT To ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming and to make appropriations for carrying the same into effect.

* * * * *

SEC. 2. That the lands ceded to the United States under the said agreement shall be disposed of under the pro-

Opening of
lands to entry.

visions of the homestead, town-site, coal, and mineral land laws of the United States and shall be opened to settlement and entry by proclamation of the President. * * *

Town-site,
coal, and min-
eral entries.

Act of Con-
gress approved
Mar. 3, 1905
(33 Stat. L.,
1016).

* * * Lands entered under the town-site, coal, and mineral land laws shall be paid for in amount and manner as provided by said laws. Notice of location of all mineral entries shall be filed in the local land office of the district in which the lands covered by the location are situated, and unless entry and payment shall be made within three years from the date of location all rights thereunder shall cease; * * * that all lands, except mineral and coal lands, herein ceded remaining undisposed of at the expiration of five years from the opening of said lands to entry shall be sold to the highest bidder for cash at not less than one dollar per acre under rules and regulations to be prescribed by the Secretary of the Interior. * * *

AN ACT To authorize the sale and disposition of surplus or unallotted lands of the diminished Colville Indian Reservation, in the State of Washington, and for other purposes.

Mineral
lands.

Act of Con-
gress approved
Mar. 22, 1906.

Sec. 3. That upon the completion of said allotments to said Indians the residue or surplus lands—that is, lands not allotted or reserved for Indian school, agency, or other purposes—of the said diminished Colville Indian Reservation shall be classified under the direction of the Secretary of the Interior as irrigable lands, grazing lands, timber lands, mineral lands, or arid lands, and shall be appraised under their appropriate classes by legal subdivisions, with the exception of the lands classed as mineral lands, which need not be appraised, and which shall be disposed of under the general mining laws of the United States.

AN ACT Making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven.

[COEUR D'ALENE INDIAN LANDS.]

Mineral
lands.

Act of Con-
gress approved
June 21, 1906
(34 Stat. L.,
336).

Coal and oil
deposits re-
served.

* * * *Provided further*, That the general mining laws of the United States shall extend after the approval of this act to any of said lands, and mineral entry may be made on any of said lands, but no such mineral selection shall be permitted upon any lands allotted in severalty to the Indians: *Provided further*, That all the coal or oil deposits in or under the lands on the said reservation shall be and remain the property of the United States, and no patent that may be issued under the provisions of this or any other act of Congress shall convey any title thereto. * * *

AN ACT To amend the laws governing labor or improvements upon mining claims in Alaska.

Act of Congress approved Mar. 2, 1907 (35 Stat. L., 1243).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

Alaska. Annual improvements, etc., required on mining claims.

Filing affidavits.

Contents.

Prima facie evidence of performance of work, etc.

Forfeiture.

Officer before whom affidavits may be made.

R. S., secs. 5392, 5393, p. 1045.

Time of filing.

Fee.

SEC. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

AN ACT Authorizing a resurvey of certain townships in the State of Wyoming, and for other purposes.

[BITTER ROOT VALLEY, MONTANA.]

SEC. 11. That all the provisions of the mining laws of the United States are hereby extended and made ap- Mining laws extended to lands.

Act of Congress approved May 29, 1908 (35 Stat. L., 467).

applicable to the undisposed-of lands in the Bitter Root Valley, State of Montana, above the mouth of the Lo Lo Fork of the Bitter Root River, designated in the act of June fifth, eighteen hundred and seventy-two: *Provided*, That all mining locations and entries heretofore made or attempted to be made upon said lands shall be determined by the Department of the Interior as if said lands had been subject to mineral location and entry at the time such locations and entries were made or attempted to be made: *And provided further*, That this act shall not be applicable to lands withdrawn for administration sites for use of the Forest Service.

AN ACT For relief of applicants for mineral surveys.

Repayment of deposits for mineral surveys.

Act of Congress approved Feb. 24, 1909 (36 Stat. L., 257). Pub. No.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of the moneys heretofore or hereafter covered into the Treasury from deposits made by individuals to cover cost of work performed and to be performed in the offices of the United States surveyors-general in connection with the survey of mineral lands, any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit; and such sums, as the several cases may be, shall be deemed to be annually and permanently appropriated for that purpose. Such repayments shall be made to the person or persons who made the several deposits, or to his or their legal representatives, after the completion or abandonment of the work for which the deposits were made, and upon an account certified by the surveyor-general of the district in which the mineral land surveyed, or sought to be surveyed is situated and approved by the Commissioner of the General Land Office.

AN ACT, Extending the time for final entry of mineral claims within the Shoshone or Wind River Reservation in Wyoming.

Time extended for making entry.

Act of Congress approved Feb. 25, 1909 (36 Stat. L., 266). Pub. No.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of chapter fourteen hundred and fifty-two of the Statutes of the Fifty-eighth Congress (United States Statutes at Large, volume thirty-three, part one), being "An act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation, in the State of Wyoming, and to make appropriations to carry the same into effect," be, and the same is hereby, amended so that all claimants and locators of mineral lands within the ceded portion of said reservation shall have five years from the date of location within which to make entry and payment instead of three years, as now provided by the said act.

REGULATIONS.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

Lode Claims.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be

restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

8. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

9. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

10. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument or stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery, it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other

side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

11. The location notice must be filed for record in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

12. In order to hold the possessory title to a mining claim located prior to May 10, 1872, the law requires that *ten dollars* shall be expended annually in labor or improvements for each *one hundred feet* in length along the vein or lode. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Where a number of contiguous claims are held in common, the aggregate expenditure that would be necessary to hold all the claims, may be made upon any one claim. Cornering locations are held not to be contiguous.

13. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

14. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

15. Upon the failure of any one of several coowners to contribute his proportion of the required expenditures, the coowners, who have performed the labor or made the improvements as required, may, at the expiration of the year, give such delinquent coowner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent coowner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his coowners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent coowner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

16. The effect of section 2323, Revised Statutes, is to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on

the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

17. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel, the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

18. A full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

Placer Claims.

19. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

20. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. Registers and receivers should make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. Lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

21. The act of February 11, 1897, provides for the location and entry of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

22. By section 2330 authority is given for subdividing forty-acre legal subdivisions into ten-acre tracts. These ten-acre tracts should be considered and dealt with as legal subdivisions, and an applicant having a placer claim which conforms to one or more of such ten-acre tracts, contiguous in case of two or more tracts, may make entry thereof, after the usual proceedings, without further survey or plat.

23. [Omitted.]

24. A ten-acre subdivision may be described, for instance if situated in the extreme northeast of the section, as the "NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " of the section, or, in like manner, by appropriate terms, wherever situated; but, in addition to this description, the notice must give all the other data required in a mineral application, by which parties may be put on inquiry as to the land sought to be patented. The proofs submitted with applications must show clearly the character and extent of the improvements upon the premises.

25. The proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. This proof should consist of the affidavit of two or more disinterested witnesses. The annual expenditure to the amount of \$100, required by section 2324, Revised Statutes, must be made upon placer as well as lode locations.

26. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. An application which omits to claim such known vein or lode must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

27. By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

28. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and such locations shall not include more than twenty acres for each individual claimant.

29. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872,

no location can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

30. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that all placer mining claims located after May 10, 1872, shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, whether the locations are upon surveyed or unsurveyed lands.

Conformity to the public land surveys and the rectangular subdivisions thereof will not be required where compliance with such requirement would necessitate the placing of the lines thereof upon other prior located claims or where the claim is surrounded by prior locations.

Where a placer location by one or two persons can be entirely included within a square forty-acre tract, by three or four persons within two square forty-acre tracts placed end to end, by five or six persons within three square forty-acre tracts and by seven or eight persons within four square forty-acre tracts, such locations will be regarded as within the requirements where strict conformity is impracticable.

Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the Government to have all entries whether of agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. (Snow Flake Fraction Placer 37 L. D., 250.)

REGULATIONS UNDER SALINE ACT.

31. Under the act approved January 31, 1901, extending the mining laws to saline lands, the provisions of the law relating to placer-mining claims are extended to all States and Territories and the district of Alaska, so as to permit the location and purchase thereunder of all unoccupied public lands containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, with the proviso, "That the same person shall not locate or enter more than one claim hereunder."

32. Rights obtained by location under the placer-mining laws are assignable, and the assignee may make the entry in his own name; so, under this act a person holding as assignee may make entry in his own name: *Provided*, He has not held under this act, at any time, either as locator or entryman, any other lands; his right is exhausted by having held under this act any particular tract, either as locator or entryman, either as an individual or as a member of an association. It follows, therefore, that no application for patent or entry, made under this act, shall embrace more than one single location.

33. In order that the conditions imposed by the proviso, as set forth in the above paragraph, may duly appear, the notice of location presented for record and the application for patent must each contain a specific statement under oath by each person whose name appears therein that he never has, either as an individual or as a member of an association, located or entered any other lands under the provisions of this act. Assignments made by persons who are not severally qualified as herein stated will not be recognized.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

Lode Claims.

34. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general; one copy of the plat to be given the claimant for posting upon the claim; one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor-general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor-general.

35. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the State or Territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States mineral surveyor such location survey can not be substituted for that required by the statute, as above indicated.

36. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length, and should be measured on the ground direct between the points, or calculated from actually sur-

veyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line or traverse line must be surveyed by the mineral surveyor at the time of his making the particular survey and be made a part thereof.

37. (a) Promptly upon the approval of a mineral survey the surveyor-general will advise both this office and the appropriate local land office, by letter (Form 4-286), of the date of approval, number of the survey, name and area of the claim, name and survey number of each approved mineral survey with which actually in conflict, name and address of the applicant for survey, and name of the mineral surveyor who made the survey; and will also briefly describe therein the *locus* of the claim, specifying each legal subdivision or portion thereof, when upon surveyed lands, covered in whole or in part by the survey; but hereafter no segregation of any such claim upon the official township-survey records will be made until mineral entry has been made and approved for patent, unless otherwise directed by this office.

(b) Upon application to make agricultural entry of the residue of any original lot or legal subdivision of forty acres, reduced by mining claims for which patent applications have been filed and which residue has been already reallocated in accordance therewith, the local officers will accept and approve the application as usual, if found to be regular. When such an application is filed for any such original lot or subdivision, reduced in available area by duly asserted mining claims but not yet relotted accordingly, the local officers will promptly advise this office thereof; and will also report and identify any pending application for mineral patent affecting such subdivision which the agricultural applicant does not desire to contest. The surveyor-general will thereupon be advised by this office of such mining claims, or portions thereof, as are proper to be segregated, and directed to at once prepare, upon the usual drawing-paper township blank, diagram of amended township survey of such original lot or legal forty-acre subdivision so made fractional by such mineral segregation, designating the agricultural portion by appropriate lot number, beginning with No. 1 in each section and giving the area of each lot, and will forthwith transmit one approved copy to the local land office and one to this office. In the meantime the local officers will accept the agricultural application (if no other objection appears), suspend it with reservation of all rights of the applicant if continuously asserted by him, and upon receipt of amended township diagram will approve the application (if then otherwise satisfactory) as of the date of filing, corrected to describe the tract as designated in the amended survey.

(c) The register and receiver will allow no agricultural claim for any portion of an original lot or legal forty-acre subdivision, where the reduced area is made to appear by reason of approved surveys of mining claims and for which applications for patent have not been filed, until there is submitted by such agricultural applicant a satisfactory showing that such surveyed claims are in fact mineral in character; and applications to have lands asserted to be mineral, or mining locations, segregated by survey, with the view to agricultural appropriation of the remainder, will be made to the register and

receiver for submission to the Commissioner of the General Land Office, for his consideration and direction, and must be supported by the affidavit of the party in interest, duly corroborated by two or more disinterested persons, or by such other or further evidence as may be required in any case, that the lands sought to be segregated *as mineral* are in fact mineral in character; otherwise, in the absence of satisfactory showing in any such case, such original lot or legal subdivision will be subject to agricultural appropriation only. When any such showing shall be found to be satisfactory and the necessary survey is had, amended township diagram will be required and made as prescribed in the preceding section.

38. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well-defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim-----	10. 50
Area in conflict with survey No. 302-----	1. 56
Area in conflict with survey No. 948-----	2. 33
Area in conflict with Mountain Maid lode mining claim, unsurveyed----	1. 48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. The application for patent should state the portions to be excluded in express terms.

39. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices will depend, in a great measure, the regularity and validity of the proceedings for patent.

40. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receive a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are

posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

41. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession and the basis of his claim to a patent. The vein or lode must be fully described, the description to include a statement as to the kind and character of mineral, the extent thereof, whether ore has been extracted and of what amount and value and such other facts as will support the applicant's allegation that the claim contains a valuable mineral deposit.

42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim, completed to the date of filing said statement and certified by the legal custodian of the records of transfers, or by a duly authorized abstractor of titles. The certificate must state that no conveyances affecting the title to the claim or claims appear of record other than those set forth.

Abstracters will be required to attach to each abstract certified by them a certificate stating that they have filed in the office of the Commissioner of the General Land Office a certified copy of the existing statute by which they are authorized to compile abstracts of title, and evidence in the form of a certificate by the proper State, Territorial, or county officer that they have complied with the requirements of such statute.

43. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, &c.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

44. Before receiving and filing an application for mineral patent local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

Local officers will give prompt and appropriate notice to the railroad grantee of the filing of every application for mineral patent which embraces any portion of an odd-numbered section of surveyed lands within the primary limits of a railroad land grant, and of

every such application embracing *any* portion of unsurveyed lands within such limits (except as to any such application which embraces a portion or portions of those ascertained or prospective odd-numbered sections only, within the limits of the grant in Montana and Idaho to the Northern Pacific Railroad Company, which have been classified as mineral under the act of February 26, 1895; without protest by the company within the time limited by the statute or the mineral classification whereof has been approved).

Should the railroad grantee file protest and apply for a hearing to determine the character of the land involved in any such application for mineral patent, proceedings thereunder will be had in the usual manner.

Any application for mineral patent, however, which embraces lands previously listed or selected by a railroad company will be disposed of as provided by the first section of this paragraph, and the applicant afforded opportunity to protest and apply for a hearing or to appeal.

Notice should be given to the duly authorized representative of the railroad grantee, in accordance with rule 17 of Practice. When the claims applied for are upon unsurveyed land, the burden of proving that they are situate within prospective odd-numbered sections will rest upon the railroad.

Evidence of service of notice should be filed with the record in each case.

45. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

46. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

47. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

48. The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several contiguous locations held in common, that an amount equal to five hundred dollars for each location has been so expended upon, and for the benefit of, the entire group; that the plat filed by the

claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated in a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof: *Provided*, That as to all applications for patents made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient, and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

49. The surveyor-general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from the mineral surveyor who makes the actual survey and examination upon the premises, and such mineral surveyor should specify with particularity and full detail the character and extent of such improvements, but further or other evidence may be required in any case.

50. It will be convenient to have this certificate indorsed by the surveyor-general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

51. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

52. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, and no other objection appears, permit the claimant to pay for the land to which he is entitled at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

53. At any time prior to the issuance of patent protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in any matter essential to a valid entry under the patent proceedings. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a coowner excluded from an application for patent

does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. (See *Turner v. Sawyer*, 150 U. S., 578-586.)

54. Any party applying for patent as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust*; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

55. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts.

56. The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

57. The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

Placer Claims.

58. The proceedings to obtain patents for placer claims, including all forms of mineral deposits excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where a placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required. Where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

59. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; the price of placer claims being fixed, however, at two dollars and fifty cents per acre or fractional part of an acre.

60. In placer applications, in addition to the recitals necessary in and to both vein or lode and placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation and that title is sought not to control water courses or to obtain valuable timber but in good faith because of the mineral therein. This statement, of course, must

depend upon the character of the deposit and the natural features of the ground, but the following details should be covered as fully as possible: If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold. If it be a building stone or other deposit than gold claimed under the placer laws, he must describe fully the kind, nature, and extent of the deposit, stating the reasons why same is by him regarded as a valuable mineral claim. He will also be required to describe fully the natural features of the claim; streams, if any, must be fully described as to their course, amount of water carried, fall within the claim; and he must state kind and amount of timber and other vegetation thereon and adaptability to mining or other uses.

If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

While this data is required as a part of the mineral surveyor's report under paragraph 167, in case of placers taken by special survey, it is proper that the application for patent incorporate these facts under the oath of the claimant.

Inasmuch as in case of claims taken by legal subdivisions, no report by a mineral surveyor is required, the claimant, in his application in addition to the data above required, should describe in detail the shafts, cuts, tunnels, or other workings claimed as improvements, giving their dimensions, value, and the course and distance thereof to the nearest corner of the public surveys.

As prescribed by paragraph 25, this statement as to the description and value of the improvements must be corroborated by the affidavits of two disinterested witnesses.

Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to proof as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

Local land officers are instructed that if the proofs submitted in placer applications under this paragraph are not satisfactory as showing the land as a whole to be placer in character, or if the claims impinge upon or embrace water courses or bodies of water, and thus raise a doubt as to the *bona fides* of the location and application, or the character and extent of the deposit claimed thereunder, to call for further evidence, or if deemed necessary, request the specific attention of the Chief of Field Service thereto in connection with the usual notification to him under the circular instructions of April 24, 1907, and suspend further action on the application until a report thereon is received from the field officer.

MILL SITES.

61. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

62. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode claim, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode claim, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

63. Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode claim for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

64. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode claim the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

65. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

CITIZENSHIP.

66. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting

forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

67. In case of an individual or an association of individuals who do not appear by their duly authorized agent, the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence, will be required.

68. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

69. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land districts; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

70. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

71. No entry will be allowed until the register has satisfied himself, by careful examination, that proper proofs have been filed upon the points indicated in the law and official regulations. Transfers made subsequent to the filing of the application for patent will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the transferee of such applicant where a transfer has been made pending the application for patent.

72. The mineral entries will be given the current serial numbers according to the provisions of the circular of June 10, 1908, whether the same are of lode or of placer claims or of mill sites.

73. In sending up the papers in a case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued. The schedule of papers, form 4-252f, should accompany the returns with all mineral applications and entries allowed.

POSSESSORY RIGHT.

74. The provisions of section 2332, Revised Statutes, will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

75. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of

title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

76. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid other than that which has been finally decided in favor of the claimant.

77. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

78. An adverse claim must be filed with the register and receiver of the land office where the application for patent is filed or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

79. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

80. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

81. The adverse claim so filed must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator. If the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

82. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: *Provided, however,* That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a mineral surveyor, and its correctness officially certified thereon by him.

83. Upon the foregoing being filed within the sixty days' period of publication, the register, or in his absence the receiver, will immediately give notice in writing to *the parties* that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived and the application for patent be allowed to proceed upon its merits.

84. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be stayed, with the exception of the completion of the publication and posting of notices and plat and the filing of the necessary proof thereof, until the controversy shall have been finally adjudicated in court or the adverse claim waived or withdrawn.

85. Where an adverse claim has been filed and suit thereon commenced within the statutory period and final judgment rendered determining the right of possession, it will not be sufficient to file with the register a certificate of the clerk of the court setting forth the facts as to such judgment, but the successful party must, before he is allowed to make entry, file a certified copy of the judgment roll, together with the other evidence required by section 2326, Revised Statutes.

86. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

87. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment of the adverse claim will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

88. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF SURVEYORS FOR SURVEY OF MINING CLAIMS AND CHARGES.

89. Section 2334 provides for the appointment of surveys to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

90. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many competent surveyors for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The statute provides that the claimant shall also be at liberty to employ any United States mineral surveyor to make the survey. Each surveyor appointed to survey mining claims before entering upon the duties of his office or appointment shall be required to enter into a bond of not less than \$5,000 for the faithful performance of his duties.

91. With regard to the platting of the claim and other office work in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

92. The surveyors-general will endeavor to appoint surveyors to survey mining claims so that one or more may be located in each mining district for the greater convenience of miners.

93. The usual oaths will be required of these surveyors and their assistants as to the correctness of each survey executed by them.

The duty of the surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.)

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

94. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

FEES OF REGISTERS AND RECEIVERS.

95. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., par. 9.)

[Paragraphs 96, 97, and 98 are superseded by the general circular instructions of June 10, 1908.]

HEARINGS TO DETERMINE CHARACTER OF LANDS.

99. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the character of lands.

100. Public land returned by the surveyor-general as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in the manner hereinafter described.

101. Hearings to determine the character of lands:

(1) Lands returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

[Paragraphs 102 to 104, inclusive, are superseded by appropriate instructions relative to nonmineral proofs in railroad, State, and forest lieu selections contained in separate circulars.]

105. At hearings to determine the character of lands the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—Whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all. In every case, where practicable, an adequate quantity or number of representative samples of the alleged mineral-bearing matter or material should be offered in evidence, with proper identification, to be considered in connection with the record, with which they will be transmitted upon each appeal that may be taken. Testimony may be submitted as to the geological formation and development of mineral on adjoining or adjacent lands and their relevancy.

106. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

107. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of minerals were first known to exist on the lands.

108. When the case comes before this office, such decision will be made as the law and the facts may justify. In cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party, *at his own expense*, will be required to have the work done by a reliable and competent surveyor to be designated by the surveyor-general. Application therefor must be made to the register and receiver, accompanied by description of the land to be segregated and the evidence of service upon the opposite party of notice of his intention to have such segregation made. The register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, Revised Statutes, as to length and width and parallel end lines.

109. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, United States commissioner, officer of a court of record, or before the register or receiver, the

deponent's character and credibility to be properly certified to by the officer administering the oath.

110. Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval, who, if he finds the work correctly performed, will furnish authenticated copies of such plat and description both to the proper local land office and to this office, made upon the usual drawing-paper township blank.

The copy of plat furnished the local office and this office must be a diagram verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 37 in the survey of mining claims on surveyed lands.

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land, he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

DISTRICT OF ALASKA.

112. Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" in the district of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

113. For the sections of the act of June 6, 1900, making further provision for a civil government for Alaska, which provide for the establishment of recording districts and the recording of mining locations; for the making of rules and regulations by the miners and for the legalization of mining records; for the extension of the mining laws to the district of Alaska, and for the exploration and mining of tide lands and lands below low tide; and relating to the rights of Indians and persons conducting schools or missions, see page 21 of this circular.

MINERAL LANDS WITHIN NATIONAL FORESTS.

114. The act of June 4, 1897, provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves

subject to location and entry under the general mining laws in the usual manner.

The act also provides that "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

Transfer of National Forests.

Act of February 1, 1905 (33 Stat., 628.)

The Secretary of the Department of Agriculture shall, from and after the passage of this act, execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four of the act entitled "An act to repeal the timber-culture laws, and for other purposes," approved March 3, 1891, and acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands.

(For further information see Use Book—Forest Service.)

SURVEYS OF MINING CLAIMS.

General Provisions.

115. Under section 2334, Revised Statutes, the U. S. surveyor-general "may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims."

116. Persons desiring such appointment should therefore file their applications with the surveyor-general for the district wherein appointment is asked, who will furnish all information necessary.

117. All appointments of mineral surveyors must be submitted to the Commissioner of the General Land Office for approval.

118. The surveyors-general have authority to suspend or revoke the commissions of mineral surveyors for cause. Before final action, however, the matter should be submitted to the Commissioner of the General Land Office for approval.

119. Such surveyors will be allowed the right of appeal from the action of the surveyor-general in the usual manner. Such appeal should be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office.

120. Neither the surveyor-general nor the Commissioner of the General Land Office has jurisdiction to settle differences, relative to the payment of charges for field work, between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, *i. e.*, in the local courts. The Department has, however, authority to investigate charges affecting

the official actions of mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment.

121. The surveyors-general should appoint as many competent mineral surveyors as apply for appointment, in order that claimants may have a choice of surveyors, and be enabled to have their work done on the most advantageous terms.

122. The schedule of charges for office work should be as low as is possible. No additional charges should be made for orders for amended surveys, unless the necessity therefor is clearly the fault of the claimant, or considerable additional office work results therefrom.

123. [Omitted.]

124. Mineral surveyors will address all official communications to the surveyor-general. They will, when a mining claim is the subject of correspondence, give the name and survey number. In replying to letters they will give the subject-matter and date of the letter. They will promptly notify the surveyor-general of any change in post-office address.

125. Mineral surveyors should keep a complete record of each survey made by them and the facts coming to their knowledge at the time, as well as copies of all their field notes, reports, and official correspondence, in order that such evidence may be readily produced when called for at any future time. Field notes and other reports must be written in a clear and legible hand or typewritten, in non-copying ink, and upon the proper blanks furnished gratuitously by the surveyor-general's office upon application therefor. No interlineations or erasures will be allowed.

126. No return by a mineral surveyor will be recognized as official unless it is over his signature as a United States mineral surveyor, and made in pursuance of a special order from the surveyor-general's office. After he has received an order for survey he is required to make the survey and return correct field notes thereof to the surveyor-general's office without delay.

127. The claimant is required, in all cases, to make satisfactory arrangements with the surveyor for the payment for his services and those of his assistants in making the survey, as the United States will not be held responsible for the same.

128. A mineral surveyor is precluded from acting, either directly or indirectly, as attorney in mineral claims. His duty in any particular case ceases when he has executed the survey and returned the field notes and preliminary plat, with his report, to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of his application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim. He is not permitted to combine the duties of surveyor and notary public in the same case by administering oaths to the parties in interest. It is preferable that both preliminary and final oaths of assistants should be taken before some officer duly authorized to administer oaths, other than the mineral surveyor. In cases, however, where great delay, expense, or inconvenience would result from a strict compliance with this rule, the mineral surveyor is authorized to administer the necessary oaths to his assistants, but in each case where this is done, he will submit to the proper surveyor-general a full written report of the circumstances which required his

stated action; otherwise he must have absolutely nothing to do with the case, except in his official capacity as surveyor. He will not employ chainmen interested therein in any manner.

Method of Survey.

129. The survey made and returned must, in every case, be an actual survey on the ground in full detail, made by the mineral surveyor in person after the receipt of the order, and without reference to any knowledge he may have previously acquired by reason of having made the location survey or otherwise, and must show the actual facts existing at the time. This precludes him from calculating the connections to corners of the public survey and location monuments, or any other lines of his survey through prior surveys made by others and substituting the same for connections or lines of the survey returned by him. The term *survey* in this paragraph applies not only to the usual field work, but also to the examinations required for the preparation of affidavits of five hundred dollars expenditure, descriptive reports on placer claims, and all other reports.

130. The survey of a mining claim may consist of several contiguous locations, but such survey must, in conformity with statutory requirements, distinguish the several locations, and exhibit the boundaries of each. The survey will be given but one number.

131. The survey must be made in strict conformity with, or be embraced within, the lines of the location upon which the order is based. If the survey and location are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of survey to the corresponding corner of the location, and the location corner must be fully described, so that it can be identified. The lines of the location, as found upon the ground, must be laid down upon the preliminary plat in such a manner as to contrast and show their relation to the lines of survey.

132. In view of the principle that courses and distances must give way when in conflict with fixed objects and monuments, the surveyor will not, under any circumstances, change the corners of the location for the purpose of making them conform to the description in the record. If the difference from the location be slight, it may be explained in the field notes.

133. No mining claim located subsequent to May 10, 1872, should exceed the statutory limit in width on each side of the center of vein or 1,500 feet in length, and all surveys must close within 50-100 feet in 1,000 feet, and the error must not be such as to make the location exceed the statutory limit, and in absence of other proof the discovery point is held to be the center of the vein on the surface. The course and length of the vein should be marked upon the plat.

134. All mineral surveys must be made with a transit, with or without solar attachment, by which the meridian can be determined independently of the magnetic needle, and all courses must be referred to the true meridian. The variation should be noted at each corner of the survey. The true course of at least one line of each survey must be ascertained by astronomical observations made at the time of the survey; the data for determining the same and details as to how these data were arrived at must be given. Or, in lieu of the foregoing, the survey must be connected with some line the true

course of which has been previously established beyond question, and in a similar manner, and, when such lines exist, it is desirable in all cases that they should be used as a proof of the accuracy of subsequent work.

135. Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States mineral monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, the connection must be with the corner of the public survey.

136. Surveys and connections of mineral claims may be made in suspended townships in the same manner as though the claims were upon unsurveyed land, except as hereinafter specified, by connecting them with independent mineral monuments. At the same time, the position of any public-land corner which may be found in the neighborhood of the claim should be noted, so that, in case of the release of the township from suspension, the position of the claim can be shown on the plat.

137. A mineral survey must not be returned with its connection made only with a corner of the public survey, where the survey of the township within which it is situated is under suspension, nor connected with a mineral monument alone, when situated within the limits of a township the regularity and correctness of the survey of which is unquestioned.

138. In making an official survey, corner No. 1 of each location must be established at the corner nearest the corner of the public survey or mineral monument, unless good cause is shown for its being placed otherwise. If connections are given to both a corner of the public survey and mineral monument, corners Nos. 1 should be placed at the corner nearest the corner of the public survey. When a boundary line of a claim intersects a section line, courses and distances from point of intersection to the Government corners at each end of the half mile of section line so intersected must be given.

139. In case a survey is situated in a district where there are no corners of the public survey and no monuments within the prescribed limits, a mineral monument must be established, in the location of which the greatest care must be exercised to insure permanency as to site and construction.

140. The site, when practicable, should be some prominent point, visible for a long distance from every direction, and should be so chosen that the permanency of the monument will not be endangered by snow, rock, or landslides, or other natural causes.

141. The monument should consist of a stone not less than 30 inches long, 20 inches wide, and 6 inches thick, set halfway in the ground, with a conical mound of stone 4 feet high and 6 feet base alongside. The letters U. S. M. M., followed by the consecutive number of the monument in the district, must be plainly chiseled upon the stone. If impracticable to obtain a stone of required dimensions, then a post 8 feet long, 6 inches square, set 3 feet in the ground, scribed as for a stone monument, protected by a well-built conical mound of stone of not less than 3 feet high and 6 feet base around it, may be used. The exact point for connection must be indicated on the monument by an X chiseled thereon; if a post is used, then a tack must be driven into the post to indicate the point.

142. From the monument, connections by course and distance must be taken to two or three bearing trees or rocks, and to any well-known and permanent objects in the vicinity, such as the confluence of streams, prominent rocks, buildings, shafts, or mouths of adits. Bearing trees must be properly scribed B. T. and bearing rocks chiseled B. R., together with the number of the mineral monument; the exact point on the tree or stone to which the connection is taken should be indicated by a cross or other unmistakable mark. Bearings should also be taken to prominent mountain peaks, and the approximate distance and direction ascertained from the nearest town or mining camp. A detailed description of the mineral monument, with a topographical map of its location, should be furnished the office of the surveyor-general by the surveyor.

143. Corners may consist of—

First.—A stone at least 24 inches long set 12 inches in the ground, with a conical mound of stone $1\frac{1}{2}$ feet high, 2 feet base, alongside.

Second.—A post at least 3 feet long by 4 inches square, set 18 inches in the ground and surrounded by a substantial mound of stone or earth.

Third.—A rock in place.

A stone should always be used for a corner when possible, and when so used the kind should be stated.

144. All corners must be established in a permanent and workmanlike manner, and the corner and survey number must be neatly chiseled or scribed on the sides facing the claim. The *exact* corner point must be permanently indicated on the corner. When a rock in place is used, its dimensions above ground must be stated and a cross chiseled at the exact corner point.

145. In case the point for the corner be inaccessible or unsuitable a witness corner, which must be marked with the letters W. C. in addition to the corner and survey number, should be established. The witness corner should be located upon a line of the survey and as near as possible to the true corner, with which it must be connected by course and distance. The reason why it is impossible or impracticable to establish the true corner must always be stated in the field notes, and in running the next course it should be stated whether the start is made from the true place for corner or from witness corner.

146. The identity of all corners should be perpetuated by taking courses and distances to bearing trees, rocks, and other objects, as prescribed in the establishment of mineral monuments, and when no bearings are given it should be stated that no bearings are available. Permanent objects should be selected for bearings whenever possible.

147. If an official mineral survey has been made in the vicinity, within a reasonable distance, a further connecting line should be run to some corner thereof; and in like manner all conflicting surveys and locations should be so connected, and the corner with which connection is made in each case described. Such connections will be made and conflicts shown according to the boundaries of the neighboring or conflicting claims as each is marked, defined, and actually established upon the ground. The mineral surveyor will fully and specifically state in his return *how* and by what *visible evidences* he was able to identify on the ground the several conflicting surveys and those which appear according to their returned tie or boundary lines to conflict, if they were so identified, and report errors or discrepancies found by him in any such surveys. In the survey of contiguous

claims which constitute a consolidated group, where corners are common, bearings should be mentioned but once.

148. The mineral surveyor should note carefully all topographical features of the claim, taking distances on his lines to intersections with all streams, gulches, ditches, ravines, mountain ridges, roads, trails, etc., with their widths, courses, and other data that may be required to map them correctly. All municipal or private improvements, such as blocks, streets, and buildings, should be located.

149. If, in running the exterior lines of a claim, the survey is found to conflict with the survey of another claim, the distances to the points of intersection, and the courses and distances along the line intersected from an established corner of such conflicting claim to such points of intersection, should be described in the field notes: *Provided*, That where a corner of the conflicting survey falls within the claim being surveyed, such corner should be selected from which to give the bearing, otherwise the corner nearest the intersection should be taken. The same rule should govern in the survey of claims embracing two or more locations the lines of which intersect.

150. A lode and mill-site claim in one survey will be distinguished by the letters A and B following the number of the survey. The corners of the mill site will be numbered independently of those of the lode. Corner No. 1 of the mill site must be connected with a corner of the lode claim as well as with a corner of the public survey or United States mineral monument.

151. When a placer claim includes lodes, or when several contiguous placer or lode locations are included as one claim in one survey, there must be given to the corners of each location constituting the same a separate consecutive numerical designation, beginning with corner No. 1 in each case.

152. Throughout the description of the survey, after each reference to the lines or corners of a location, the name thereof must be given, and if unsurveyed, the fact stated. If reference is made to a location included in a prior official survey, the survey number must be given, followed by the name of the location. Corners should be described once only.

153. The total area of each location and also the area in conflict with each intersecting survey or claim should be stated. But when locations embraced in one survey conflict with each other such conflicts should only be stated in connection with the location from which the conflicting area is excluded.

154. It should be stated particularly whether the claim is upon surveyed or unsurveyed public lands, giving in the former case the quarter section, township, and range in which it is located, and the section lines should be indicated by full lines and the quarter-section lines by dotted lines.

155. The title-page of the field notes must contain the post-office address of the claimant or his authorized agent.

156. In the mineral surveyor's report of the value of the improvements all *actual* expenditures and *mining* improvements made by the claimant or his grantors, having a direct relation to the development of the claim, must be included in the estimate.

157. The expenditures required may be made from the surface or in running a tunnel, drifts, or crosscuts for the development of the claim. Improvements of any other character, such as buildings,

machinery, or roadways, must be excluded from the estimate, unless it is shown clearly that they are associated with actual excavations, such as cuts, tunnels, shafts, etc., are essential to the practical development of and actually facilitate the extraction of mineral from the claim.

158. All mining and other improvements claimed will be located by courses and distances from corners of the survey, or from points on the center or side lines, specifying with particularity and detail the dimensions and character of each, and the improvements upon each location should be numbered consecutively, the point of discovery being always No. 1. Improvements made by a former locator who has abandoned his claim can not be included in the estimate, but should be described and located in the notes and plat.

159. In case of a lode and mill-site claim in the same survey the expenditure of five hundred dollars must be shown upon the lode claim.

160. If the value of the labor and improvements upon a mineral claim is less than five hundred dollars at the time of survey, the mineral surveyor may file with the surveyor-general supplemental proof showing five hundred dollars expenditure made prior to the expiration of the period of publication.

161. The mineral surveyor will return with his field notes a preliminary plat on tracing paper, protracted on a scale of two hundred feet to an inch, if practicable. In preparing plats the top is north. Copy of the calculations of areas by double meridian distances and of all triangulations or traverse lines must be furnished. The lines of the claim surveyed should be heavier than the lines of conflicting claims.

162. Whenever a survey has been reported in error the surveyor who made it will be required to promptly make a thorough examination upon the premises and report the result, under oath, to the surveyor-general's office. In case he finds his survey in error he will report in detail all discrepancies with the original survey and submit any explanation he may have to offer as to the cause. If, on the contrary, he should report his survey correct, a joint survey will be ordered to settle the differences with the surveyor who reported the error. A joint survey must be made within ten days after the date of order unless satisfactory reasons are submitted, under oath, for a postponement. The field work must in every sense of the term be a *joint* and not a separate survey, and the observations and measurements taken with the same instrument and chain, previously tested and agreed upon.

163. The mineral surveyor found in error, or, if both are in error, the one who reported the same, will make out the field notes of the joint survey, which, after being duly signed and sworn to by both parties, must be transmitted to the surveyor-general's office.

164. Inasmuch as amended surveys are ordered only by special instructions from the General Land Office, and the conditions and circumstances peculiar to each separate case and the object sought by the required amendment, alone govern all special matters relative to the manner of making such survey and the form and subject-matter to be embraced in the field notes thereof, but few general rules applicable to all cases can be laid down.

165. The amended survey must be made in strict conformity with, or be embraced within, the lines of the original survey. If the

amended and original surveys are identical, that fact must be clearly and distinctly stated in the field notes. If not identical, a bearing and distance must be given from each established corner of the amended survey to the corresponding corner of the original survey. The lines of the original survey, as found upon the ground, must be laid down upon the preliminary plat in such manner as to contrast and show their relation to the lines of the amended survey.

166. The field notes of the amended survey must be prepared on the same size and form of blanks as are the field notes of the original survey, and the word "amended" must be used before the word "survey" wherever it occurs in the field notes.

167. Mineral surveyors are required to make full examinations of all placer claims at the time of survey and file with the field notes a descriptive report, in which will be described—

(a) The quality and composition of the soil, and the kind and amount of timber and other vegetation.

(b) The *locus* and size of streams, and such other matter as may appear upon the surface of the claims.

(c) The character and extent of all surface and underground workings, whether placer or lode, for mining purposes, locating and describing them.

(d) The proximity of centers of trade or residence.

(e) The proximity of well-known systems of lode deposits or of individual lodes.

(f) The use or adaptability of the claim for placer mining, and whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose.

(g) What works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(h) The true situation of all mines, salt licks, salt springs, and mill sites which come to the surveyor's knowledge, or a report by him that none exist on the claim, as the facts may warrant.

(i) Said report must be made under oath and duly corroborated by one or more disinterested persons.

168. The employing of claimants, their attorneys, or parties in interest, as assistants in making surveys of mineral claims will not be allowed.

169. The field work must be accurately and properly performed and returns made in conformity with the foregoing instructions. Errors in the survey must be corrected at the surveyor's own expense, and if the time required in the examination of the returns is increased by reason of neglect or carelessness, he will be required to make an additional deposit for office work. He will be held to a strict accountability for the faithful discharge of his duties, and will be required to observe fully the requirements and regulations in force as to making mineral surveys. If found incompetent as a surveyor, careless in the discharge of his duties, or guilty of a violation of said regulations, his appointment will be promptly revoked.

S. V. PROUDFIT,
Acting Commissioner.

Approved March 29, 1909.

R. A. BALLINGER,
Secretary.

RIGHT-OF-WAY RAILROADS.

The following is a copy of an act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States:"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

SEC. 2. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

SEC. 3. That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and, where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act [to amend an act entitled an act] to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four.

SEC. 4. That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

SEC. 5. That this act shall not apply to any lands within the limits of any military park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed.

SEC. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved, March 3, 1875. (18 Stat., p. 482.)

By the act of Congress, approved March 3, 1899, 30 Stat., 1233, it is provided:

That *in the form provided by existing law* the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.

1. *Nature of grant.*—A railroad company to which a right of way is granted does not secure a full and complete title to the land on which the right of way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and such patentee takes the fee, subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right of way has attached, take the same subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this department.

2. *National forest.*—When a right of way is located within a national forest the applicant must enter into such stipulation and execute such bond as the Forest Service may require for the protection of such national forest.

3. *Proposed national forest.*—When a right of way is located within a proposed national forest the applicant must file a stipulation under seal incorporating the following:

(a) That the proposed right of way is not so located as to interfere with the proper occupation of the reservation by the Government.

(b) That the applicant will cut no timber from the reserve outside the right of way and will remove no timber within the right of way, except only such as is rendered necessary for the proper use and enjoyment of the privilege for which application is made.

(c) That he will remove from the reservation or destroy, under such safeguards as may be deemed necessary by the General Land Office, all standing, fallen, and dead timber, as well as all tops, lops, brush, and refuse cuttings on the right of way for such distance on each side of the central line as may be required by the General Land Office to protect the forest from fire.

(d) That the applicant will furnish free of charge such assistance in men and material for fighting fires as may be spared without serious injury to the applicant's business.

(e) That should any portion of said right of way be included within a national forest the applicant shall clear and keep clear, as required by the Forester, such width on each side of the track as shall be determined by the Forester, and the applicant shall pay, as required by the

Forester, for all national forest timber cut or destroyed in such clearing outside said right of way.

The applicant will also be required to give bond, to be approved by the Commissioner of the General Land Office, stipulating that the United States will be compensated for any and all damage to the public lands, timber, natural curiosities, or other public property on such proposed national forest, or upon the lands of the United States, by reason of such use and occupation of the proposed reserve, regardless of the cause or circumstances under which such damage may occur. A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

No construction will be allowed in a national forest or a proposed national forest until an application for right of way has been regularly filed in accordance with the laws of the United States and has been approved, or has been considered by this department, and permission for such construction has been specifically given.

4. *Right of way over private land.*—Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 3 of the act, or the right can be purchased as provided by section 2288 of the Revised Statutes, as amended by section 3 of the act of March 3, 1891 (26 Stat., 1095).

5. *Articles of incorporation, etc.*—Any railroad company desiring to obtain the benefits of the law is required to file in the General Land Office, or with the register of the land district in which the principal terminus of the road is to be located, who will forward them to the General Land Office—

(a) A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

(b) A copy of the state or territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same was the law at the date of incorporation. (See paragraph *g* of this section.)

(c) If the law directs that the articles of incorporation or other papers connected with the organization be filed with any state or territorial officer, there must be submitted the certificate of such officer that the same have been filed according to law, and giving the date of the filing thereof.

(d) When a company is operating in a State or Territory other than that in which it is incorporated it must submit the certificate of the proper officer of the State or Territory that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

(e) The official statement, by the proper officer, under the seal of the company, that the organization has been completed, that the

company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory in which it is incorporated. (Form 1.)

(f) A certificate by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2.)

(g) If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to the General Land Office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of paragraph (b) of this section a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

6. *Maps*.—The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the right of way is located; but if the right of way is located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds.

The maps should show any other road crossed, or with which connection is made, and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map would thereby be too much crowded to be easily read, then duplicate field notes should be filed separate from the map. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. In all cases station numbers should be given on the map where changes of numbering occur and where the lines of the public surveys are crossed, with distances to the nearest existing corner. The map must also show the lines of reference of initial and terminal points, with their courses and distances.

7. *Field notes*.—Typewritten field notes, with clear carbon copies, are preferred whenever separate field notes are necessary, as they expedite the examination of applications. The field notes, whether given on the map or filed separately, must be so complete that the line may be retraced from them on the ground. They should show whether lines were run on true or magnetic bearings, and if run on magnetic bearings the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public-survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

8. *Scale of maps*.—The scale of maps showing the line of route should be 2,000 feet to the inch ordinarily, but when absolutely necessary the scale may be increased to 1,000 feet to the inch. These scales are fixed so that maps may be readily handled and filed. In most cases, by furnishing separate field notes an increase of scale may be

avoided. Plats of station grounds should be drawn on a scale of 500 feet to the inch, and must be filed separately from the map of the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

9. *Public land subdivisions.*—All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown.

10. *Termini.*—The termini of the line of road should be fixed by reference of course and distance to the nearest existing corner of the public survey. The map, field notes, engineer's affidavit, and president's certificate (Forms 3 and 4) should each show these connections. The company must certify in Form 4 that the road is to be operated as a common carrier of passengers and freight. A tract for station grounds must be similarly referenced and described on the plat and in Forms 7 and 8, except when the tract conforms to the subdivisions of the public surveys, in which case it may be described in the forms according to the subdivisions.

11. *Connections on unsurveyed land.*—When either terminal of the line of route is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than 6 miles distant, and the single bearing and distance from the terminal point to the corner must be computed and noted on the map, in the engineer's affidavit, and in the president's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given.

12. *Connections with monuments on unsurveyed land.*—When an established corner of the public survey is more than 6 miles distant this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark, and must give the course and distance to the terminus. There must be given an accurate description of the mark and full data of the traverse, as required above. The engineer's affidavit and president's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

13. *Surveyed and unsurveyed land.*—When the line of route lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in Forms 3 and 4 by connection of termini and length, as though each portion were independent.

When lands desired for station grounds lie partly on unsurveyed land, the areas of the several parts on surveyed and unsurveyed land must be separately stated on the map and in Forms 7 and 8.

Lines of route or station grounds lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see section 14.)

14. *Right of way wholly on unsurveyed land.*—Maps of lines of route or plats of station grounds lying wholly on unsurveyed lands may be received and placed on file in the General Land Office and the local

land office of the district in which the same is situated, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps or plats will not dispense with the filing of maps or plats after the survey of the lands and within the time limited in the act granting the right of way. If these maps or plats are in all respects regular when filed, they will receive the Secretary's approval. In filing such maps or plats the initial and terminal points will be fixed as indicated in sections 11 and 12.

15. *Connections with public survey corners.*—Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. The map or plat should show these distances and the station numbers at the points of intersection. When field notes are submitted, they should also contain these distances and station numbers.

16. *Affidavit and certificate required.*—The engineer's affidavit and president's certificate must be written on the map, and must both designate by termini and length, in miles and decimals, the line of route for which right of way application is made. (See Forms 3 and 4.) Station grounds must be described by initial point and area in acres (see Forms 7 and 8); and when they are on surveyed land the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein. (See section 10.)

17. *Spurs.*—Where right of way is desired for spurs or short branch lines which will not greatly enlarge the size of the map, they may be shown on the same map with the main line, and should be separately described in the forms by termini and length. For longer branch lines separate maps should be filed.

18. *Notation on maps and records.*—When maps are filed the register will note on each the name of the land office and the date of filing, over his written signature. Notations will also be made on the records of the local land office, as to each *unpatented* tract affected, that application for right of way is pending, giving date of filing and name of applicant. The register will certify on each map, over his written signature, that unpatented land is affected by the proposed right of way. The maps and field notes in duplicate, and any other papers filed in connection with the application, will then be promptly transmitted to the General Land Office with report that the required notations have been made on the records of the local land office. Any valid right existing at the date of the filing of the right of way application will not be affected by the filing or approval thereof. (See section 1.) If no unpatented land is involved in the application the local officers will reject it, allowing the usual right of appeal.

Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will mark upon the township plats the line of the railroad or location of station grounds, as laid down on the map or plat. They will also note, in ink, on the tract books, opposite each tract marked as required by section 18, that the same is to be disposed of subject to the right of way for the railroad company's line of road or station grounds.

19. *Evidence of construction.*—When the railroad is constructed, an affidavit of the engineer and certificate of the president (Forms 5 and 6) must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required, except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.

20. *Right of way through lands segregated from the Yosemite National Park and included in the Sierra National Forest.*—The act of February 7, 1905 (33 Stat., 702), so far as it relates to the use of the lands within the addition to the Sierra National Forest made by it, for right-of-way purposes, is as follows:

Provided, That all those tracts or parcels of land described in section one of the said act of October first, eighteen hundred and ninety, and not included within the metes and bounds of the land above described, be, and the same are hereby, included in and made part of the Sierra Forest Reserve: *And provided further*, That the Secretary of the Interior may require the payment of such price as he may deem proper for privileges on the land herein segregated from the Yosemite National Park and made a part of the Sierra Forest Reserve accorded under the act approved February fifteenth, nineteen hundred and one, relating to rights of way over certain parks, reservations, and other lands, and other acts concerning rights of way over public lands; and the moneys received from the privileges accorded on the lands herein segregated and included in the Sierra Forest Reserve shall be paid into the Treasury of the United States, to be expended, under the direction of the Secretary of the Interior, in the management, improvement, and protection of the forest lands herein set aside and reserved, which shall hereafter be known as the "Yosemite National Park."

SEC. 2. That none of the lands patented and in private ownership in the area hereby included in the Sierra Forest Reserve shall have the privileges of the lieu-land scrip provisions of the land laws, but otherwise to be in all respects under the laws and regulations affecting the forest reserves, and immediately upon the passage of this act all laws, rules, and regulations affecting forest reservations, including the right to change the boundaries thereof by executive proclamation, shall take effect and be in force within the limits of the territory excluded by this act from the Yosemite National Park, except as herein otherwise provided.

Before approval is given any application for right of way affecting these lands, the Secretary of the Interior will fix the price for the privilege, and payment thereof must be made. The applicant must expressly agree to enter into a contract to make further annual payments for such privilege should the Secretary of the Interior, upon consideration of the facts in each particular case, so prescribe. Such payments, when required, shall be made to the Secretary of the Interior, to be placed to the credit of the special fund provided for in this act, to be expended in the management, improvement, and protection of the Yosemite National Park.

An applicant for the privilege of transporting persons and material through the reserve to the Yosemite National Park will also be required, when in the judgment of the Secretary of the Interior the

convenience of the public requires it, to file in the Department a stipulation agreeing to transport the cars of any other person or company over its road upon the payment of such reasonable charge as may be determined upon between the parties, or by the Secretary of the Interior.

FRED. DENNETT,
Commissioner.

Approved May 21, 1909.

R. A. BALLINGER,
Secretary.

FORMS FOR DUE PROOFS, AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR RAILROADS.

FORM 1.

I, _____, secretary (or president) of the _____ company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of _____; and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.]

_____ of the _____ Company.

FORM 2.

STATE OF _____,
County of _____, ss:

I, _____, do certify that I am the president of the _____ company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.]

President of Company.

FORM 3.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the said company's line of railroad described as follows: (here describe the line of route as required by section 10), a length of _____ miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the _____ day of _____, 190—, and ending on the _____ day of _____, 190—; and that the survey of the said line is accurately represented on this map and by the accompanying field notes.

Sworn and subscribed to before me this _____ day of _____, 190—.

[SEAL.]

Notary Public.

FORM 4.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said railroad, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said railroad upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the _____ day of _____, 190—, as the definite location of the said railroad, described as follows: (describe as in Form 3); and that this map has been prepared to be filed in order to obtain the benefits of the act of Congress approved March 3, 1875, entitled "An act

granting to railroads the right of way through the public lands of the United States." I further certify that the said railroad is to be operated as a common carrier of passengers and freight.

Attest:
[SEAL OF COMPANY.]

President of the _____ Company.

Secretary.

FORM 5.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says that he is the chief engineer of (or was employed to construct) the railroad of the _____ company; that said railroad has been constructed under his supervision, as follows: (describe as in section 10), a total length of _____ miles; that construction was commenced on the _____ day of _____, 190—, and completed on the _____ day of _____, 190—; and that the constructed railroad conforms to the map and field notes which received the approval of the Secretary of the Interior on the _____ day of _____, 190—.

Sworn and subscribed to before me this _____ day of _____, 190—.
[SEAL.]

Notary Public.

FORM 6.

I, _____, do hereby certify that I am the president of the _____ company; that the railroad described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of _____, chief engineer (or the person employed by the company in the premises); that the location of the constructed railroad conforms to the map and field notes approved by the Secretary of the Interior on the _____ day of _____, 190—; and that the company has in all things complied with the requirements of the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

President of the _____ Company.

Attest:
[SEAL OF COMPANY.]

Secretary.

FORM 7.

STATE OF _____,
County of _____, ss:

_____, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the _____ company; that the survey of the tract described as follows: (here describe as required by section 10) an area of _____ acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the _____ day of _____, 190—, and ending on the _____ day of _____, 190—; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; that the company has occupied no other grounds for similar purposes upon public lands within the section of 10 miles, from the _____ mile to the _____ mile, for which this selection is made; that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

Subscribed and sworn to before me this _____ day of _____, 190—.
[SEAL.]

Notary Public.

FORM 8.

I, _____, do hereby certify that I am president of the _____ company; that _____, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the tract described as follows: (here describe as in Form 7) an area of _____ acres, and no more, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the _____ day of _____, 190____, as the definite location of said tract for station grounds; that the company has occupied no other grounds for similar purposes upon public lands within the section of 10 miles, from the _____ mile to the _____ mile, for which this selection is made; that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

President of the _____ Company.

Attest:

[SEAL OF COMPANY.]

Secretary.

FORFEITURE ACTS.

The act of June 26, 1906 (34 Stat., 482), declaring the forfeiture of the rights of way granted under the act of March 3, 1875 (18 Stat., 482), under certain conditions, reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: *Provided,* That in any case under this Act where construction of the railroad is progressing in good faith at the date of the approval of this Act the forfeiture declared in this Act shall not take effect as to such line of railroad.

The forfeiture of such rights of way was further declared by the act of February 25, 1909 (Pub. No. 260) in the following language:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: *Provided,* That no right of way on which construction is progressing in good faith at the time of the passage of this Act shall be in any wise affected, validated or invalidated, by the provisions of this Act.

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723

The office of the declaratory statement is not to create, but is solely to preserve, a preference right of entry, theretofore acquired by the opening and improving of a mine or mines of coal; and if the right does not exist, the declaratory statement has no office to perform and is without force or effect for any purpose.....

723

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Any proceeding initiated by the land department before the expiration of two years from the issuance of final certificate, calculated to test the validity of an entry and the claimant's right to patent, is sufficient to bar confirmation under the proviso to section 7 of the act of March 3, 1891.....

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A direction by the General Land Office to a special agent to investigate a particular entry, followed by an investigation by the special agent and request by him that the entry be suspended to await his report, all within two years after the issuance of the

final certificate, will bar confirmation of the entry under the proviso to section 7 of the act of March 3, 1891. 379

A direction to a special agent of the land department to investigate an entry, within two years from the issuance of final certificate, followed by an investigation and report by a different special agent after the expiration of the two-year period, is sufficient to prevent the interposition of the bar created by the proviso to section 7 of the act of March 3, 1891, provided the investigation and report are in furtherance of the direction given within the period of limitation and part of the same proceeding. 167

A general order suspending all entries of a specified class within a given territory will not bar confirmation under the proviso to section 7, act of March 3, 1891, but there must be a direct charge against each particular entry, or they must be specifically listed for investigation within the two-year period, in order to stop the running of the statute. (Overruled, p. 618). 90

The order of March 26, 1903, directing the investigation of all entries within the former Siletz Indian Reservation, on the ground of supposed fraud in connection therewith, together with the subsequent actions by the land department with respect to such entries taken within the two-year period, are sufficient to bar the operation of the proviso to section 7 of the act of March 3, 1891. 618

After the expiration of the two-year period fixed by the proviso to section 7 of the act of March 3, 1891, a stranger will not be allowed to intervene and take part as plaintiff in the prosecution of a proceeding commenced by the Government within that period. 663

The proviso to section 7 of the act of March 3, 1891, was not intended to operate as a conveyance springing up at the expiration of two years from the date of the issuance of final certificate, nor as confirming or validating an invalid entry; but merely to limit the time within which proceedings may be instituted before the land department looking to the cancellation of final entries. 181

Where, therefore, an entry is allowed without authority of law, as in this case for unsurveyed land, the mere lapse of two years after the issuance of final certificate does not have the effect to cure the invalidity. 181

The proviso to section 7 of the act of March 3, 1891, does not preclude proceedings subsequent to the expiration of two years from the issuance of final certificate with a view to investigating and determining the known character of the land at the date of final entry, and canceling the entry should the evidence show that the land was at that time known to be chiefly valuable for coal. 590

Contest.

Where one of several heirs of a deceased contestant makes entry, in the exercise of the preference right, for and in behalf of all the heirs, a contest against such entry must make all the heirs parties, and notice thereof must be served upon each and all of them. 601

The failure of the notary public to attach his seal to the jurat to the affidavit filed as the basis for the service of notice of a contest by publication, upon which affidavit publication was made, was a mere clerical error, subject to correction at any time, and did not deprive the local officers of jurisdiction to proceed with the contest. 603

Where after the conclusion of testimony on behalf of contestant the contest is, on motion, dismissed for want of jurisdiction, without any evidence having been submitted on behalf of the entryman, but is subsequently reinstated without notice to the entryman, no action affecting the entry should be taken in the contest proceeding without affording the entryman an opportunity to submit testimony in his behalf. 603

Where a contest is filed in collusion with an entryman for the sole purpose of gaining time to sell a relinquishment and obstruct a possible later contest, and prior to the consummation of the collusive scheme a second contest is filed charging such collusion and the entryman's failure to comply with law, and at a hearing duly had after notice to all parties the allegations of the second contest are sustained, the second contestant is entitled to a preference right of entry, notwithstanding a prior application to enter filed on relinquishment of the entry under attack and with knowledge of the second contest. 460

Contestant.

The act of May 14, 1880, does not confer upon a successful contestant a vested right to enter the land, but merely a preferred right of entry for thirty days as against everyone except the United States. 450

Where after the cancellation of an entry as the result of a contest, but prior to exercise by the contestant of his preferred right, the land is withdrawn for inclusion within a national forest, the contestant's preference right is thereby defeated. 450

The preference right given by section 2 of the act of May 14, 1880, is in the nature of a reward to an informer, and to entitle a contestant to claim the benefits of the offer thereby made it must appear that he has not only contested an entry and paid the land office fees in that behalf, but it must further appear that he has "procured the cancellation" of the entry. 513

Where after the filing of an affidavit of contest a relinquishment of the entry is filed and a stranger to the record is allowed to enter the land, the contestant, in instances where the allegations of the affidavit

are sufficient if proven to require the cancellation of the entry, and actual notice to the contestee does not appear of record, should be notified to submit affirmative proof that the relinquishment was the result of the contest, with due notice to the second entryman, who may present any counter showing upon this question he may desire. 513

Where it affirmatively appears of record that the contestee had actual notice of the contest before the filing of the relinquishment, or where notice was by publication and was posted and published in accordance with the rules of practice, or where, in the absence of record notice the contestant establishes actual knowledge of the filing of the affidavit of contest on the part of the contestee, or some one in privity with him, prior to the filing of the relinquishment, it will be presumed as matter of law and fact that such relinquishment was induced by the contest. 513

When the contestant shall have established to the satisfaction of the land department that a relinquishment of the entry under contest was induced by such contest, he thereby brings himself within the conditions of the offer extended to him by said act, and will be recognized to claim the privileges thereby accorded, even as against an entryman who inadvisedly secured the relinquishment of the former entry and in good faith filed the same and himself made entry of the land in ignorance of the pending contest. 513

Where a second contest is filed charging collusion in a prior contest, notice thereof should be issued and served upon the entryman and the prior contestant and the second contestant permitted to participate in the hearing upon the first contest by introducing evidence to support the charges made by him. 560

Should the entry in such case be relinquished prior to hearing on the first contest, notice of the cancellation of the entry should be given both contestants, and in event both apply to enter within the preferred right period, the junior contestant should be given opportunity to prove the charge of collusion and thereby defeat the preference right of the first contestant. 560

Where the affidavit of a junior contestant charging collusion is not filed until after hearing upon the prior contest, and the entry is canceled as a result of the first contest, the junior contest will wholly fail; but the junior contestant is not thereby precluded from attacking the application of the successful contestant to enter the land, upon the ground of collusion or any other valid cause, should the latter attempt to exercise a preferred right of entry. 560

Under a second contest suspended to await disposition of a prior contest against the same entry, the second contestant, upon relinquishment of the entry after dismissal of the first contest for want of prosecution, is entitled to a preference right of entry, regardless of the fact that the first contestant was allowed thirty days within which to apply for reinstatement of his contest and within that period filed the entryman's relinquishment accompanied by his application to enter. 217

Where at the time of tendering his application to enter or locate land covered by an unapproved railroad indemnity selection the applicant questions the validity of such selection, and procures its cancellation, he does not thereby acquire a preference right of entry, but is only entitled to have his application determined on its merits, and in event it is properly rejected he can not set up a new and independent right or claim to the prejudice of intervening adverse rights. 65

Desert Land.

GENERALLY.

Lands that one year with another for a series of years will not without artificial irrigation produce reasonably remunerative crops are desert within the meaning of the desert land law. 522

Lands situated within a notoriously arid or desert region, and themselves previously desert within the meaning of the desert-land law, do not necessarily lose their character as desert lands merely because of unusual rainfall for a few successive seasons their productiveness was increased and larger crops were raised thereon; and under such circumstances a strong preponderance of evidence will be required to take them out of the class of desert lands. 522

One who makes desert entry of such lands must, however, clearly show, in submitting proof, not only that he has the right to a sufficient supply of water to successfully irrigate the lands, and that the system of ditches is adequate for that purpose, but also that the necessary supply of water has been actually used on said lands in a manner to prove the beneficial results. 522

ENTRY.

Regulations of November 30, 1908, governing desert land entries and proofs. 312

Paragraph 3 of instructions of February 29, 1908, governing amendments of original entries, construed to embrace desert land entries. 43

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The character of land at the date of desert-land entry thereof controls in determining whether the land is subject to such entry, and the fact that the entryman purchased the improvements of a prior desert entryman for the same land does not entitle him to have the character of the land determined as of the date of the prior entry..... 89

An expenditure for "disking" land embraced in a desert-land entry, with a view to planting the same to crop, may be accepted as equivalent to first plowing of the soil, where the land is of such character that diskings is the best practical way of preparing it for crop and the method usually employed in that vicinity, and the entryman is entitled to credit therefor toward meeting the requirements of law with respect to annual expenditure..... 75

Section 3 of the act of March 28, 1908, authorizing an extension of time within which a desert-land entryman may make proof of reclamation and cultivation, contemplates that unavoidable delay in the construction of the irrigating works by means of which the entryman intends to convey water upon his claim is the only ground upon which its provisions may be invoked; and in the absence of some actual, tangible work in the way of an irrigation system on the claim, a mere intention, or even contract, to obtain water from an irrigation system in the future, in event the practicability of such system be demonstrated by actual test, is not sufficient to warrant the extension authorized by the act..... 332

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Equitable Adjudication.

After the passage of the act of March 2, 1889, withdrawing the public lands of the United States, except in the State of Missouri, from private sale, the land department was without authority to permit private cash entry for lands outside of that State, and an entry so allowed is not subject to confirmation by the board of equitable adjudication..... 285

A private cash entry allowed prior to the act of March 2, 1889, for lands which had never been offered at public sale, is void and not subject to confirmation by the board of equitable adjudication, notwithstanding the land should theretofore have been offered but through inadvertence was omitted from the offering..... 285

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Applications under that section embracing in excess of 160 acres may be allowed where the excess is less than the deficiency would be if the smallest legal subdivision were eliminated.....	330	INDIAN.	
A transfer of land by an intending homesteader with a view to removing the disqualification resulting from the ownership of more than 160 acres will not be held effective for that purpose unless actual and in good faith and evidenced by such facts as show that it is not a mere collusive device to evade the law.....	176	The acts of March 3, 1875, and July 4, 1884, known as the Indian homestead acts, confer upon Indians, as such, who locate or settle upon public lands, or those not living upon a reservation, and who have severed their tribal relations, the right to make homestead entry as fully as citizens of the United States, except that for a certain specified time after the issuance of patent they are deprived of the power to alienate the lands....	219
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No such right was acquired by a mere application to enter, without settlement or improvements, prior to the act of February 8, 1908, as will overcome the equities of a <i>bona fide</i> settler who at the time of such application was maintaining an actual residence and had made valuable improvements upon the land, and who is qualified under the provisions of that act to make a second entry, especially in view of the fact that he had a prior pending application for the same land, supported by a showing tending to evidence that he in fact had never had the benefit of the homestead right.....	382	A mere power of attorney to locate a soldiers' additional right and to sell the land located therewith does not invest the attorney in fact with any right except as agent for his principal, and the death of the soldier prior to location of the right under such powers constitutes a revocation thereof and the right remains an asset of his estate.....	116
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The heirs of a deceased homestead entryman who during his lifetime failed to comply with the law, may complete the entry by either residing upon or cultivating the land for the full period of five years, if sufficient of the lifetime of the entry remains for that purpose; or may commute upon a showing of residence and cultivation for fourteen months, but can not commute upon a showing of cultivation alone.....	519	Upon the death of a soldier entitled to an additional entry under section 2306, R. S., leaving a widow and minor children, the additional right, under the provisions of section 2307, R. S., passes to the widow; but	

if she remarry without exercising the right, it thereupon goes to the minor children, without liability to divestiture in event the widow again become sole. 194

The widow of a soldier who made homestead entry in her own right for less than 160 acres and remarried prior to the adoption of the Revised Statutes is not entitled to an additional entry under the provisions of section 2307, R. S., notwithstanding she may again have become a widow and was unmarried at the date of the adoption of such statutes. 475

Where a soldiers' additional location is relinquished as to a portion of the land embraced therein, because of insufficiency of the base offered, substitution of other base for such relinquished portion, as of the date of the original application, can not be allowed in the face of an intervening withdrawal for forestry purposes. 112

A homestead entry based upon an application executed before a commanding officer of the United States Army, under section 2293, R. S., at a time when the applicant was no longer in the military service, is not for that reason void, but voidable merely, and furnishes a sufficient basis for a soldiers' additional right under section 2306, R. S. 712

The record of the United States relating to the enrollment, muster, and discharge of members of its armies must control in all actions of the departments of the Government; and the fact that a State record with respect to the service of a soldier does not agree with the United States record can not be considered as in anywise impeaching the record of the Government. 588

The right of additional entry conferred by section 2306, R. S., is dependent upon service for ninety days by the soldier; and there is no authority for crediting him with the term of his enlistment where he was discharged for disability before serving ninety days. 588

By the allowance of entry upon a soldiers' additional location the additional right is merged in the land, and upon cancellation of the entry title to the right vests solely in the entryman or his assigns. 104

Where an entry allowed upon a soldiers' additional right was canceled, recertification of the right, even though otherwise proper, will not be made except upon satisfactory showing that no sale of the entry was made prior to cancellation, or if made that the right was reacquired and is vested in the person seeking recertification. 104

Where one entitled to a soldiers' additional right of 80 acres under section 2306, R. S., based upon an original entry canceled upon relinquishment, was permitted to make a second homestead entry for 80 acres, at a time when there was no law authorizing second homestead entries, and

patent having issued upon such entry, it will be regarded as having been made in the exercise of, and as exhausting, the soldiers' additional right. 4

The law does not contemplate, and the Department has never authorized or sanctioned, the location of combinations of fractional portions of different soldiers' additional rights in such manner that by aid of the rule of approximation an amount of land only a trifle less than double the area of the combined rights might thereby be taken; and locations so made are therefore not entitled to equitable consideration on the claim that they were made in faith of departmental construction of the law. 28

COMMUTATION.

A second homestead entry made under the act of April 28, 1904, which forbids commutation of entries made thereunder, may be perfected under the act of February 8, 1908, which permits commutation. 660

The provisions of section 9 of the act of May 29, 1908, protecting commutation entries where final certificate issued upon proof showing residence for at least eight months within the year immediately preceding the submission of proof, contemplate substantially continuous presence upon the land for an aggregate of eight months during that year. 166

A homestead entry made with no intention of establishing a permanent *bona fide* home upon the land, but merely with a view to submitting a showing sufficient to support commutation, must be canceled, notwithstanding the proof offered shows full technical compliance with respect to inhabitancy of the land for the period ordinarily required in commutation cases. 683

The purpose of the homestead law is the donation of the public lands to actual settlers seeking to establish *bona fide* homes thereon, and the provision respecting commutation in no wise changes that purpose but merely affords a means of commuting further residence to cash in meritorious cases lawfully initiated and prosecuted to the date of commutation. 683

ACTS OF APRIL 28, 1904.

1. *Kinkaid Act.*

Regulations of October 28, 1908, under Kinkaid Act. 225

A former homestead entry outside of the territory described in the act of April 28, 1904, commonly known as the Kinkaid Act, is no bar to an entry under the provisions of that act of a tract which, together with the land in the former entry, shall not exceed 640 acres. 171

Persons who had made homestead entry within the area withdrawn for irrigation purposes under the provisions of section 1 of the act of April 28, 1904, commonly known as the Kinkaid Act, are upon restoration of

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the withdrawn lands to entry entitled to the preference right to make additional entry granted by section 3 of said act, for a period of thirty days from the date of restoration	197	The act of June 8, 1880, providing for the confirmation and patenting of claims of settlers under the preemption or homestead laws who become insane before the expiration of the time during which residence, cultivation, and improvement is required by law, where compliance with legal requirements up to the time of becoming insane is shown, contemplates confirmation only in cases where actual residence has been established and maintained up to the time of becoming insane.....	212
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Instructions of May 3, 1909, with respect to exchange of Chippewa allotments under act of May 23, 1908.....	665	It is not only the right, but the duty, of the appointing power to revoke the appointment of an incompetent or negligent mineral surveyor, that future impositions upon mining claimants may be avoided.....	95
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GENERALLY.

General regulations of March 29, 1909... 728, 757

SURVEY.

The terms upon which a mineral survey is made are matters of private contract between the owner of the mining claim and the mineral surveyor, and not enforceable by the Land Department which, in case of default on the part of the surveyor, has no power to designate another surveyor to make a correction or amended survey at the expense of the bondsmen of the defaulting surveyor, or to require the latter to correct his work without expense to the claimant, or to impose upon the claimant the condition that an amended or correction survey, for which it may devolve upon him to apply, shall be made without expense to the surveyor who made the original survey..... 95

In the event a mineral surveyor neglects or refuses to make necessary corrections or amendments of a survey executed by him; it devolves upon the mining claimant to apply for an amended survey to meet the requirements..... 95

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The statutory requirements that the fact of posting of notice upon a mining claim shall be shown by an affidavit of at least two persons, and that such affidavit shall be verified before an officer authorized to administer oaths within the land district where the claim is situated, are mandatory; and the defect in patent proceedings due to the execution of such affidavit outside of the land district can not be cured by the subsequent filing of a properly verified affidavit... 155

ADVERSE CLAIM.

In determining whether an adverse judicial proceeding has been instituted within the statutory period, the Department will not undertake to review an order of a court of competent jurisdiction recognizing the initiation of such proceedings within said period, while the suit so begun is pending within said court..... 484

While section 2325, R. S., contemplates patent proceedings upon a mining claim only by those having full possessory title at the time of the filing of the application for patent, yet in case application is filed by only one of several cotenants, without joining the other cotenants as parties, and legal notice of the application is given, it is incumbent upon an adverse claimant to

assert his claim in the manner provided by statute; otherwise, as against that patent proceeding, he will be held to have waived his adverse claim, and the pending application will be subject to adjudication by the Land Department upon equitable principles..... 715

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A protest by a mineral claimant, based upon the alleged mineral character of the land, should set forth the kind of mineral and the character and general situation of the formation claimed by the protestant, as well as any other material matter upon which the respective rights of the parties may be determined..... 401

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A mineral entry based upon an essentially defective notice is unauthorized and must be canceled; nor can that entry be validated and sustained by a republication and re-posting of notice of the patent application, but entry must thereafter be made anew to afford a lawful basis for a patent..... 365

PLACER.

Section 2331, R. S., applies to placer locations upon both surveyed and unsurveyed lands, and the provision therein that such locations shall conform as nearly as practicable to the "system of public land surveys and the rectangular subdivisions of such surveys," contemplates that locations upon unsurveyed lands shall, as nearly as reasonably practicable, be rectangular in form, compact, and with east-and-west and north-and-south bounding lines..... 250

A placer location, whether upon surveyed or unsurveyed lands, will not be required to conform to the public land surveys and the rectangular subdivisions of such surveys when such requirement would necessitate placing the lines thereof upon other prior located claims or when the claim is surrounded by prior locations..... 250

Where strict conformity is impracticable, placer locations hereafter made may be regarded as within the requirements in that

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respect where a location by one or two persons can be entirely included within a square 40-acre tract, by three or four persons within two square 40-acre tracts placed end to end, by five or six persons within three square 40-acre tracts, and by seven or eight persons within four square 40-acre tracts...	250	Whatever presumption may arise that a particular tract of land was offered at public sale, from the fact that it lies within a township directed by proclamation to be offered and that no reason is apparent or shown by the record why it should not have been so offered along with the other lands in the township, is overcome by the fact that the tract does not appear in the list of lands returned as actually offered under the proclamation.....	428
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The mere fact that patent was erroneously issued upon a railroad indemnity selection without awaiting the expiration of the period within which an applicant to select the same land under the act of June 4, 1897, was entitled under the Rules of Practice to appeal from the rejection of such application, will not warrant the institution of suit to vacate the patent, where it appears the patentee is entitled to the land and cancellation of the patent would have to be followed by the issuance of a new patent to the same patentee. 670

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Where the register or receiver is sworn as a witness and testifies as to a disputed fact at the hearing in a contest case, he should not act in his official capacity in the decision of the case. 35

Where prior to decision on the merits of a contest proceeding the local officers require contestant to reimburse defendant for costs of taking testimony, and on appeal from such requirement their action is sustained, the case should thereupon be remanded for action on the merits. 444

The failure of the notary public to attach his seal to the jurat to the affidavit filed as the basis for the service of notice of a contest by publication, upon which affidavit publication was made, was a mere clerical error, subject to correction at any time, and did not deprive the local officers of jurisdiction to proceed with the contest. 603

Where after the conclusion of testimony on behalf of contestant the contest is, on motion, dismissed for want of jurisdiction, without any evidence having been submitted on behalf of the entryman, but is subsequently reinstated without notice to the entryman, no action affecting the entry should be taken in the contest proceeding without affording the entryman an opportunity to submit testimony in his behalf. 603

While as a rule the department will permit oral argument in contested cases pending before it when requested by both parties, or upon the application of either where the questions involved may affect the public generally, yet in ordinary cases, where only individual interests are involved and the decision to be rendered will affect only the particular case, the party applying for the oral argument must first obtain the assent of the opposing party before his application will be allowed. 479

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Circular of March 30, 1909, under act of February 26, 1909, relating to extension of time for filing small-holding claims. 536

The land department is without authority to pass upon the validity and extent of a private-land grant confirmed and surveyed under decree of the Court of Private Land Claims, or to determine as to the validity of the decree and survey, its jurisdiction; after approval of the survey, being limited to the ministerial duty to issue patent, all other matters being solely within the jurisdiction of the courts. 480

While the validity of title to a private land grant does not depend upon the issuance of a patent, where the boundaries of the tract have been clearly defined and can be identified, it is nevertheless the duty of the Land Department to fix by appropriate surveys the boundaries designated by the confirmatory act, especially where such survey is essential to the accurate segregation and delimitation of the private claim from the public lands. 509

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After the passage of the act of March 2, 1889, withdrawing the public lands of the United States, except in the State of Missouri, from private sale, the Land Department was without authority to permit private cash entry for lands outside of that State, and an entry so allowed is not subject to confirmation by the board of equitable adjudication. 285

A private cash entry allowed prior to the act of March 2, 1889, for lands which had never been offered at public sale, is void and not subject to confirmation by the board of equitable adjudication, notwithstanding the land should therefore have been offered but through inadvertence was omitted from the offering. 285

Land once offered and subsequently segregated from the public domain by entry, selection, withdrawal, etc., prior to the passage of the act of March 2, 1889, thereby lost its status as offered land, and until reoffered is not subject to private entry; but the character of offered land at the date of the passage of the act of March 2, 1889, and thereafter segregated, is not altered nor on that account taken out of the class of land subject to private entry or military bounty land warrant location. 65

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Lands within the area added to the reservation of the Gros Ventre and other Indians by executive order of April 13, 1875, as modified by executive order of July 13, 1880, come within the purview of the act of May 1, 1888, restoring the lands ceded by the Gros Ventre and other Indians to the public domain, but are not subject to selection as indemnity by the Northern Pacific Railway Company under the act of July 2, 1864..... 410

The allowance of entry upon an application pending at the time of the presentation of a railroad selection for the same land is in effect a rejection of the proffered selection, and cancellation of the entry does not operate to revive the application to select, although never formally rejected, to the prejudice of the rights of an adverse claimant... 37

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Where at the date of selection of a tract of land by a railroad company it is free from any adverse claim and is otherwise subject to selection, the claim of the company under its selection can not be defeated by any attempted initiation of rights between the date of selection and the approval thereof by the Secretary of the Interior in the regular course of business..... 260

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Held: That the mere presentation of the application to enter, not based upon settlement, was not sufficient to bar reinstatement of the company's selection..... 426

The question as to the character of land for which selection is tendered by the railway company under the act of March 2, 1899, is solely between the Government and the company, and where no protest is lodged against a selection, *prima facie* regular and in accordance with the terms of the act, upon the ground that the land selected is mineral in fact and was known to be such at the time of selection, the company will be permitted to perfect its claim..... 135

The fact that lands were classified as mineral under the act of February 26, 1895, will not prevent selection thereof by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, if otherwise within the terms of that act..... 135

Land embraced within a *bona fide* settlement claim is not subject to selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, and a selection allowed for land at the time covered by a subsisting settlement can not stand, notwithstanding the settlement claim may have been subsequently abandoned..... 193

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Section 4 of the act of March 2, 1899, recognizes the right of the Northern Pacific Railway Company to take unsurveyed lands in making selection under the provisions of that act. 70

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Where an owner of land entitled to the right of election accorded by the act of July 1, 1898, transfers the same, such sale will not *per se* be presumed to be an election to retain the land; and in such case the right of election may be exercised by the transferee. 414

Congress having by the acts of July 5, 1884, and August 23, 1894, provided a special and exclusive mode for the disposal of lands in abandoned military reservations, such lands are not subject to selection by the Northern Pacific Railway Company under the act of July 1, 1898. 667

The lands formerly embraced within the reservation of the Gros Ventre and other Indians and restored to the public domain by the act of May 1, 1888, are subject to lieu selection by the Northern Pacific Railway Company under the act of July 1, 1898. 408

There is nothing in the act of August 15, 1894, providing for the opening of lands in the Siletz Indian Reservation, to prevent a settler on an odd-numbered section within the limits of the grant to the Northern Pacific Railway Company, who relinquished his rights under the provisions of the act of July 1, 1898, from transferring his claim to lands within that reservation, with credit for residence on the relinquished lands. 280

A mere application to purchase under the timber and stone act, rejected prior to January 1, 1898, because in conflict with an unapproved indemnity selection by the Northern Pacific Railway Company, but pending on appeal on that date, does not present a claim for adjustment under the provisions of the act of July 1, 1898. 394

Where prior to May 31, 1905, a timber and stone applicant submitted satisfactory proof and tendered the proper fees and purchase price, but upon which entry was withheld, not on account of any defect in the proof, but solely to await investigation by a special agent under general instructions with respect to timber and stone proofs in cases where the witnesses were not cross-examined by special agent, the claim of the applicant will be regarded as an entry within the purview of the act of July 1, 1898, as extended by the act of May 17, 1906, and as subject to adjustment under the provisions of said acts. 604

One who prior to January 1, 1898, settled upon unsurveyed lands within the limits of the grant to the Northern Pacific Railway Company and within ninety days after the filing of the township plat had his claim placed of record in the local office and declared his election to retain the land, is entitled to have his claim adjusted under the provisions of the act of July 1, 1898. 569

The Northern Pacific Railway Company can not by sale or contract to sell lands within the limits of its grant after definite location and subsequent to the passage of the act of July 1, 1898, defeat the right of an adverse claimant to have his claim adjusted under the provisions of that act. 569

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Patent.

The mere fact that patent was erroneously issued upon a railroad indemnity selection without awaiting the expiration of the period within which an applicant to select the same land under the act of June 4, 1897, was entitled under the Rules of Practice to appeal from the rejection of such application, will not warrant the institution of suit to vacate the patent, where it appears the patentee is entitled to the land and cancellation of the patent would have to be followed by the issuance of a new patent to the same patentee. 670

In 1892 the Southern Pacific Railroad Company filed application, subsequently approved, to make selection of a certain legal subdivision, described according to the official plat of the survey (of 1869) then in use as "fractional section 1" of a certain township and as containing 641.40 acres. In 1894 a resurvey of the township was made, on the plat whereof the subdivision so selected was shown as lot 37, and another and different tract was shown as section 1, also fractional, containing 206.47 acres. In 1896 patent issued to the company, on its approved selection, for "all of fractional section 1, containing six hundred and forty-one acres, and forty hundredths of an acre," in said township.

Held: That in view of the record upon which it issued, the patent vested title to the tract actually selected and intended to be selected by the company in accordance with the original survey, the identity of which tract was preserved upon resurvey, and not to the tract designated as fractional section 1 by the later survey..... 243

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Congress having by the acts of July 5, 1884, and August 23, 1894, provided a special and exclusive mode for the disposal of lands in abandoned military reservations, such lands are not subject to selection by the Northern Pacific Railway Company under the act of July 1, 1898..... 667

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The question as to the character of land for which selection is tendered by the railway company under the act of March 2, 1899, is solely between the Government and the company, and where no protest is lodged against a selection, *prima facie* regular and in accordance with the terms of the act, upon the ground that the land selected is mineral in fact and was known to be such at the time of selection, the company will be permitted to perfect its claim. 135

The fact that lands were classified as mineral under the act of February 26, 1895, will not prevent selection thereof by the Northern Pacific Railway Company under the provisions of the act of March 2, 1899, if otherwise within the terms of that act. 135

Land embraced within a *bona fide* settlement claim is not subject to selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, and a selection allowed for land at the time covered by a subsisting settlement can not stand, notwithstanding the settlement claim may have been subsequently abandoned. 193

Land embraced within a *bona fide* settlement claim is not subject to selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, and a selection allowed for land at the time covered by such claim can not stand, notwithstanding the settlement claim may have been subsequently abandoned. 502

An affidavit of contest against a selection by the Northern Pacific Railway Company under section 3 of the act of March 2, 1899, based upon prior settlement, should allege that the settler was at the date of such settlement qualified to enter the land under the homestead law. 502

Section 4 of the act of March 2, 1899, recognizes the right of the Northern Pacific Railway Company to take unsurveyed lands in making selection under the provisions of that act. 70

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The mere fact that patent was erroneously issued upon a railroad indemnity selection without awaiting the expiration of the period within which an applicant to select the same land under the act of June 4, 1897, was entitled under the Rules of Practice to appeal from the rejection of such application, will not warrant the institution of suit to vacate the patent, where it appears the patentee is entitled to the land, and cancellation of the patent would have to be followed by the issuance of a new patent to the same patentee. 670

Reservoir Lands.

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A permanent easement attaching to public lands by the construction of a reservoir and canals upon a right of way acquired under the act of March 3, 1891, does not, upon acquisition of such irrigation system by the United States for use in connection with a project under the reclamation act, become extinguished by merger in the estate of the Government in such reservoir lands; and entries allowed for lands within and below the flowage contour line of the reservoir as marked upon the township plat, are subject to the right of flowage by storage of waters in the reservoir. 6

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Where at the date of the act of July 3, 1890, providing for the admission of Idaho into the Union, a portion of a section 16 or

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36 was occupied by town-site settlement initiated prior to survey, the grant of sections 16 and 36 made to the State for school purposes by section 4 of that act will not prevent the town-site settlement being carried to entry.....	455

Where a township is rendered fractional by reason of a permanent body of water, and what would otherwise be the school sections therein can not for that reason be surveyed, the area of land within the township susceptible of survey determines the quantity of indemnity school land to which the State is entitled under sections 2275 and 2276, R. S. 430

Where what is susceptible of survey would be an entire township is covered by a permanent body of water, the State is not entitled to indemnity for the school sections thereby lost to its grant.....

430

Where an illegal indemnity school selection was made by the State of California, and neither the State nor the United States has consented to a ratification thereof under the act of March 1, 1877, a third party, not claiming any right or title growing out of such illegal selection, will not be heard to question the right of the United States and the State to adjust the grant between themselves as to the land involved.....

343

Where a State makes school indemnity selection of a quarter-section containing 160 acres as a whole, upon a base of another quarter section assigned as a whole, and the base so assigned is defective in part, it must be held defective in toto; and such defective base can not be amended so as to defeat an intervening adverse claim.....

609

An indemnity selection based upon lands lost to the school grant by reason of being within a forest reserve, made under the provisions of the act of February 28, 1891, prior to the repeal of the act of June 4, 1897, can not be carried to completion under the provisions of the later act after the repeal thereof, where the selection as made was not in accordance with the requirements of that act.....

610

Lands to which the State does not have full legal title at the date of selections based thereon do not constitute a valid base to support indemnity selections authorized by the act of February 28, 1891.....

610

The approval of a school indemnity selection, constituting a disposition of public lands, is a matter within the exclusive jurisdiction of the Land Department, and until that jurisdiction has been lost by the issue of patent or other action equivalent thereto, the courts, either State or Federal, may not interfere to control the exercise of such jurisdiction.....

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While the mere inclusion of sections 16 and 36, granted for school purposes, within a withdrawal made for the purpose of investigation and examination of the lands with a view to possible inclusion in a national

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forest, is not such a reservation thereof as will afford a base for indemnity, yet where such withdrawal continued for a number of years, and the school sections have since been included in a permanent reservation, a selection based upon such sections, although filed during the period of temporary withdrawal, may be adjudicated in the light of the present status of the base lands.	500	
Title does not vest in the State of California under its school grant until the granted sections have been surveyed, and where subsequent to survey of a township in the field, but prior to approval of the survey by the Commissioner of the General Land Office, the township is withdrawn for forestry purposes, no rights to the school sections therein accrue to the State, and such sections do not therefore constitute a valid base for the selection of lieu lands under the exchange provisions of the act of June 4, 1897.	164	
If the Black Hills National Forest is a permanent reservation for national purposes within the meaning of section 10 of the act of February 22, 1889, sections 16 and 36 therein are by the express terms of said act excepted from the grant for school purposes made to the State of South Dakota by said section 10; and if, on the other hand, said national forest is only a temporary reservation within the meaning of that act, the title of the State under its grant will not attach to the sections 16 and 36 therein so long as the reservation exists, in view of the fact that the lands were unsurveyed at the time the reservation was established. During the continuance of the reservation, therefore, lands in sections 16 and 36 therein may be administered by the Forest Service in all respects as other lands in the reservation.	470	
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Patents on locations of Wyandotte scrip must, under the express terms of the treaty of January 31, 1855, issue "in the names of the reservees"	596	
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The circular of February 21, 1908, requiring publication of notice of all applications to locate scrip, warrants, certificates, soldiers' additional rights, or to make lieu-land selections, filed on or after April 1, 1908, merely makes mandatory after that date		
what theretofore was within the discretionary power of the Land Department to require, and in no wise affects its authority to require notice of applications filed prior to that time.	342	
By the cancellation of an entry located with agricultural college scrip the scrip is released and becomes the personal property of the owner of the entry at that time, locatable upon other lands either by the owner or his assignee; and a quit-claim deed executed by such owner subsequent to the cancellation of the entry, purporting to convey all right, title, and interest in the land formerly located, is without effect to pass any right or title to the scrip.	207	
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The provision of section 3 of the act of May 14, 1880, according to persons who settle upon public lands with the intention of claiming the same under the homestead laws a period of ninety days after the land has become subject to entry, filing and selection within which to file applications to enter, gives a preference right to the land, if asserted within that period, but no preference in the order of filing or adjudication of right or claim.	476	
States and Territories.		
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An application by a State for the survey of lands, with a view to selection thereof, does not operate as an absolute withdrawal of the lands, but merely subjects them to the preferred right of the State to make selection thereof within sixty days from the date of the filing of the approved plat of survey. 70

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The treaties of May 7, 1864, and March 19, 1867, by which a reservation was provided for the Chippewa Indians, were not made pursuant to any law enacted prior to the act of March 12, 1860, making a grant of swamp lands to the State of Minnesota, and hence lands of the character granted lying within said reservation were not thereby excluded from the operation of the grant..... 397

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The provision in section 2 of the swamp land grant to the State of Minnesota that the selection of surveyed lands shall be made within two years from the adjournment of the legislature of the State at its next session after the date of the act, and as to unsurveyed lands within two years from such adjournment after notice by the Secretary of the Interior to the governor of the State that the surveys have been completed and confirmed, is not a condition or limitation of the grant, but merely a direction to the Secretary of the Interior.....	397	
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As a general rule a decree of a court adjudicating the ownership of a military bounty land warrant will be accepted as sufficient evidence of ownership where it appears that the court had jurisdiction of the parties and the subject-matter; but the mere fact that the court assumed to decree as to such ownership will not prevent the Land Department from inquiring into the jurisdictional facts upon which the court acted.....		82
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Directions given that where the locator of a military bounty land warrant fails to submit satisfactory evidence of title to the warrant, and is permitted to make substitution of another warrant to which good title is shown, the warrant first used shall be returned to the locator or other person entitled to make the substitution, with an indorsement thereon, in red ink, showing the attempted location upon the particular tract located, with the name of the locator and a reference to the decision adjudging the evidence of title in the locator incomplete. 423

The assignment in blank of a military bounty land warrant, if otherwise regular, merely vests the right of property in the purchaser to whom it is delivered and impliedly authorizes him to fill the blank with his name when he locates or assigns the warrant, but does not make it an instrument negotiable by mere delivery nor vest title in a mere finder or purloiner, and it is within the power of the Land Department when a warrant so assigned in blank is presented for location to require evidence showing that the holder is in fact the lawful owner thereof. ... 93

After the obligation of the Government has been satisfied with respect to a military bounty land right, the authority of the Commissioner of Pensions as to that claim is at an end; and a duplicate warrant thereafter erroneously issued by him upon such right is an absolute nullity, and no action on the part of the Commissioner of the General Land Office purporting to recognize such

duplicate can give it validity, nor can a purchaser thereof be protected, however innocent he may have been as to any infirmity of title, and even though he may have purchased in faith of the recognition given thereto by the Commissioner of the General Land Office. 39

While a full and clear showing will be required as to how, when, and upon what consideration the first stranger claimant of a military bounty land warrant acquired title thereto from the warrantee, his widow, or heirs, as to subsequent transfers reasonable presumptions may be indulged in favor of title by possession of the warrant for a long-continued period, where lapse of time has made the production of positive proof as to the manner and circumstances under which it was acquired practically impossible, unless there are circumstances tending to discredit or cast suspicion upon the title of such holder. 607

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Words and Phrases Construed.

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